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IN THE

Supreme Court of the United States

PEEK-A-BOO LOUNGE OF BRADENTON, INC., a Florida Corporation d/b/a Peek-a-Boo Lounge,

Petitioner,

v.

MANATEE COUNTY, FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does The Unchecked Manipulation of This Court's Decision in *Alameda Books* Do Violence to Important First Amendment Concerns?

II. Does The Eleventh Circuit's Use of Summary Judgment as a Way of Disposing of "Adult Entertainment" Cases Result in a Due Process Violation And Further Aggravate The Existing Split Of Authority And Confusion Interpreting *Alameda Books*?

III. Does The Failure of The Eleventh Circuit to Adhere To The *Alameda Books* Decision and The Evidentiary Standard Articulated Therein Sufficiently Underscore The Conflict Among Circuit Courts and Their View Of the "Shifting Burdens" Established in That Decision To Justify Review?

LIST OF PARTIES

The Petitioner, Peek-A-Boo Lounge of Bradenton, Inc., is the only party before the Court. M.S. Entertainment, Inc. d/b/a "Pandora's Box," and GT Management, Inc., d/b/a "Paper Moon," did not pursue the appeal in the Eleventh Circuit. Manatee County, Florida is, and has always been, the sole respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner Peek-a-Boo has no parent corporation and no publiclay held corporation owns 10 percent or more of its stock.

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The opinion of the Eleventh Circuit Court of Appeals is reported at *Peek-A-Boo Lounge of Bradenton, Inc., a Florida Corporation d/b/a Peek-A-Boo Lounge, v. Manatee County*, 630 F.3d 1346 (11th Cir. 2011). The opinion of the United States District Court for the Middle District of Florida is reported at *Peek-A-Boo Lounge of Bradenton, Inc., a Florida Corporation d/b/a Peek-A-Boo Lounge, v. Manatee County*, 2009WL4349319 (M.D. Fla. 2009).

STATEMENT OF JURISDICTION

The Eleventh Circuit's opinion, affirming the District Court's order granting summary judgment in favor of Respondent, Manatee County, was rendered January 21, 2011. No petition for rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment 14

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...

Manatee County, Florida Ordinances-

Ordinance 05-21- This Ordinance imposed a variety of operational, licensing, and administrative requirements on adult dancing establishments, and replaced Ordinances 98-46 and 99-18. The restrictions contained in this legislation eliminated any form of "topless dancing," and restricted any performer licensed to provide adult entertainment in a licensed facility from exposing more than "a majority of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point," or showing "a majority of the male or female buttocks." The restrictions also prohibited the sale, use or consumption of alcoholic beverages on the premises. These restrictions were adopted purportedly on the basis of several "Whereas" clauses, and a section relating the "rationale and findings" which were the subject of evidentiary challenges below. The relevant sections of this Ordinance appear at in Appendix A at 4a-7a.

STATEMENT OF THE CASE

In 1987, when Manatee County first adopted an "Adult Entertainment Code," the effort to "regulate" the only *two* adult dancing establishments in the County resulted in a zoning ordinance that rendered as non-conforming uses the "Peek-A-Boo Lounge" and "Temptations" (run by M.S. Entertainment, Inc.: "M.S."). The Clubs filed suit in the district court, challenging the constitutionality of this legislation under the First Amendment. In 1989, the parties settled their dispute, allowing the establishments to operate, problem free, for almost a decade.

Some years later, shortly after the election of two County Commissioners vocally opposed to adult entertainment, in November of 1998, the County amended the Adult Entertainment Code to enact additional zoning regulations, as well as enacting specific physical requirements severely limiting the business operations of the Clubs through the adoption of Ordinance 98-46. Only four short months later, the County then adopted a generally applicable "public nudity ordinance," Ordinance 99-18, which defined "nudity" very broadly, and limited the exposure of "anatomical areas" in these only *two* adult dancing establishments to the same "public nudity" allowed on the street or on the beach. Peek-A-Boo and M.S. again sued the County, and, after losing to a summary judgment granted the County by the district court, appealed to the Eleventh Circuit, which reversed and remanded the case as shown in the decision in *Peek-A-Boo* 337 F.3d 1251 (11th Cir. 2003), (*Peek-A-Boo I*). In *Peek-A-Boo I*, the Circuit Court ruled that the challenged legislation was either invalid because of the complete lack of any legislative predicate (Ordinance 98-46), or

summary judgment was inappropriate for the "public nudity" ordinance (Ordinance 99-18), since the legislation was based on "outdated foreign studies." The Clubs had been operating in full compliance with the prior extensive adult entertainment regulations already in place in the County Code, presenting First Amendment protected dance performances and providing alcoholic beverages to their patrons for many years without incident, the Peek-A-Boo having been in operation since at least 1978.

Rather than attempt to defend Ordinances 98-46 and 99-18, the County initiated the adoption of Ordinance 05-21. Adopted April 19, 2005, this ordinance imposed extensive licensing, operational and regulatory restrictions, prohibiting even expressive nudity and eliminating an important aspect of the Clubs' success: the sale of alcoholic beverages. On September 12, 2005, Peek-A-Boo, M.S., and a new Club, GT Management, Inc., d/b/a "Paper Moon," filed an extensive complaint, primarily pursuant to 42 U.S.C. § 1983, and the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. The complaint alleged that the legislation was unsupported by any ***valid*** legislative predicate, and that the enforcement of the legislation would ultimately destroy the ability to operate the subject businesses, restraining First Amendment rights and business property rights in the process. Going from a place of public assembly where the business format included the presentation of exotic dancers exposing anatomical areas to a gleefully receptive audience, in conjunction with the responsible sales and service of alcoholic beverages, to the restrictions of the ordinance was asserted by Plaintiffs as being fatal to the continued operation of the Clubs. Critically, the prohibitions of the legislation limited any performance to

"semi-nudity," defined as "...a condition in which a person is not nude, but is showing the majority of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or is showing the majority of the male or female buttocks." The vagueness challenge to this definition was rejected in the scope of the summary judgment, but, limiting an "adult" performance to the exposure of no more than a "majority" of the female breast, or a "majority" of the buttocks, in what were "topless bars," and being allowed to be no closer than 6 feet to a patron, ***at any point in a given evening***, no matter what attire the performer later put on, coupled with a complete prohibition of alcoholic beverages, was seen by the Clubs as a recipe for unavoidable business failure.

In challenging the legislation, the primary argument was that the operation of these subject Clubs did not cause any disproportionate secondary effects within the County, did not cause any decrease in property values, did not cause any increase in criminal activity, did not accelerate urban blight, or cause any detrimental impact on the citizens of Manatee County. The Petitioner compiled vast amounts of studies, data and evidence and presented it directly to the County Commission, both prior to and during the 2005 public hearings held for the adoption of the legislation. This data included extensive reviews of the flawed methodology of the "studies" relied upon by the County, as well as extensive "local studies" showing that, according to the records maintained by the County's own law enforcement agencies, the businesses at issue did not exhibit any adverse impact by causing crime. The County also included a significant amount of data, and the primary experts and opinion witnesses, both supporting

and opposing the legislation, provided testimony directly to the County Commission during those public hearings. These materials, extensive and voluminous for both sides, were filed by the County in conjunction with their Motion for Summary Judgment, which included the entire "legislative record."

The Petitioner filed its Response in Opposition to Motion for Summary Judgment on July 30, 2007. Prior to any trial on the merits, on November 25, 2009, on the basis of improperly rejecting competing expert opinions and weighing the credibility of those competing opinions and reports, the United States District Court for the Middle District of Florida, Tampa Division, granted Summary Judgment to Manatee County with respect to all challenges to the County legislation. This judgment was predicated primarily on the decision in *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007), which essentially stands for the proposition that governmental predicates (the "studies" and prior judicial decisions ostensibly showing some generalized connection between the operation of adult business and the dreaded "secondary effects" alleged to be caused by such businesses), are essentially ***immune from any meaningful challenge***, regardless of countervailing expert opinions showing the County's studies to be woefully "shoddy."

An appeal was filed on December 22, 2009, with the Eleventh Circuit Court of Appeals, which affirmed the summary judgment on January 21, 2011. This Petition ensues.

REASONS FOR ALLOWANCE OF THE WRIT

I. The Unchecked Manipulation of This Court's Decision in *Alameda Books* Does Violence to Important First Amendment Concerns

The critical importance of this Petition goes to the heart of the American judicial system's steadfast policy of ensuring the ***right*** of any party in a dispute, constitutional or otherwise, to put on ***evidence*** addressing the truth or falsity of a fact in dispute. When the First Amendment scope of this matter is factored in, it shows the crying need for this Court to bring back the fundamental due process and evidentiary analyses articulated in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 438 (2002). While *Alameda Books* has apparently tortured courts at every level of state and federal judiciaries, the continued manipulation of *Alameda Books*, particularly in the Eleventh Circuit, has resulted in a complete loss of meaningful access to the courts, and a situation where legislation, long seen as subject to challenge because of its impact on fundamental constitutional rights, is now immune from challenge, and protected by what have been construed as "irrebuttable presumptions."

This Court is being called on to eliminate the manipulation of the *Alameda Books* decision to prevent any meaningful, evidentiary evaluation of competing theories on "secondary effects," and ensure that "controversial speech," as presumably manifest in adult dancing establishments, gets the same due process and access to the courts as other types of "controversial speech." Since this legislation directly impinges on the exercise of fundamental First Amendment rights and

imposes regulatory and operational restrictions that, under the guise of being adopted to address the alleged "adverse secondary effects" purportedly caused by adult businesses, often results in the annihilation of those businesses, this Petition seeks to eliminate the practice of countless courts in "picking and choosing" isolated language from the *Alameda Books* decision to support totally inconsistent and irreconcilable approaches to the "burden shifting" analysis articulated therein.

Petitioner urges the acceptance of the instant Petition for review and clarification because it satisfies each of the factors identified in Rule 10, the criteria designed to guide this Court's decisions as to whether or not to grant certiorari review. The decision of the Eleventh Circuit, in addition to being a manifest denial of Petitioner's due process rights by failing to allow Petitioner to fully litigate its claims because of erroneous "factual determinations," is in direct and irreconcilable ***conflict with decisions of this Court***. The questions presented identify a critical ***conflict among the federal circuits***, some respecting an application of the rules of evidence, and others, like the Eleventh Circuit, rejecting any meaningful ability to put evidence in the "scales of justice."

Of equal importance, the Eleventh Circuit has decided a ***significant question of federal law,*** arising under the Free Speech Clause of the First Amendment which has been interpreted in different ways by multiple state and federal courts. These conflicting interpretations have resulted in a critical issue that has not been clearly settled by this Court, and cries out for resolution. All of this has been brought about by differing and irreconcilable opinions arising from the various courts dealing with the issues initially addressed in the *Alameda Books* decision.

It is of the utmost constitutional importance that this Court grant this Petition. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Unfortunately, in virtually every level of the judiciary today, and robustly evident throughout the Federal Circuits misconstruing or attempting to "fill in the blanks" of this Court's prior adult entertainment decisions, the "sexually oriented business" right to Free Speech is in extreme peril. If censorship, achieved through the imposition of regulations that infringe on the lawful operation of businesses dealing with controversial themes can occur with ***no clear burden*** on the government to prove any governmental interest served by that censorship, and no meaningful opportunity for an adversely affected party to challenge "shoddy evidence," freedom is lost. This case involves nothing less important than the First Amendment, and the decision sought to be reviewed in this Court, as set forth below, is worthy of consideration, and, dare we say, scrutiny.

II. The Eleventh Circuit's Continuing Embrace of Summary Judgment as a Way of Disposing of "Adult Entertainment" Cases Results in a Rejection of "The Rules Of Evidence" And Further Aggravates The Existing Split Of Authority And Confusion Interpreting *Alameda Books*

The Eleventh Circuit, in affirming the grant of summary judgment issued by the District Court, (*Peek-A-Boo II*) manipulates the language of *Alameda Books* to reduce the long recognized "intermediate scrutiny" to something abysmally less than even a "rational basis,"

and incorrectly overlooks this Court's precedent (and historical Eleventh Circuit precedent) which mandate a full and fair opportunity to evaluate conflicting evidence, in an appropriate *evidentiary hearing*, to test the hypothesis that adult entertainment businesses create "adverse secondary effects."1 The critical issue in this argument is that ordinances which purport to regulate any form of "adult-entertainment" are unconstitutionally "content based" unless it can be shown that any challenged legislation is designed to target the so called "secondary effects" of adult businesses. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *City of Renton v.*

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1. It must be acknowledged that there are peer-reviewed articles and judicial opinions which establish the fact that adult businesses do not invariably cause adverse secondary effects. *See, e g., Peek-A-Boo Lounge*, 337 F.3d at 1268; *Flanigan's Enterprises, Inc., v. Fulton County, Ga.*, 242 F.3d 976, 986 (11th Cir. 2001); and *Erie Boulevard Triangle Corp v. City of Schenectady*, 250 F.Supp.2d 22, 32 (N.D.N.Y. 2003); Daniel Linz, Bryant Paul, Kenneth C. Land, Jay R. Williams & Michael E. Ezell, An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina, 38 Law & Society Review, No. 1 (2004); Daniel Linz, Bryant Paul & Mike Z. Yao, Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California, 43 The Journal of Sex Research 182 (2006); Daniel Linz, Mike Z. Yao & Sahara Byrne, Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?, 7 Communication Law Review, 23-53 (2007); and Roger Enriquez, Jeffrey M. Cancino & Sean P. Varano, A Legal and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006) (non-peer reviewed published study that found no connection between crime rates and live entertainment "adult" businesses).

Playtime Theaters Inc., 475 U.S. 41 (1986). It was in *Renton* where the concept of "evidence" was deemed necessary to support such legislation. Indeed, in upholding the ordinance at issue in *Renton*, this Court held that, "the First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities so long as whatever ***evidence*** the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *City of Renton* at 53, (emphasis added). This concept was later modified by *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *Alameda Books, supra*, which first identified the right of a party to challenge the evidence relied upon by a local government in the adoption of such legislation, and then created a "burden shifting" in the evaluation of such evidence if the challenging party could "cast doubt" on the evidence relied upon by the government. It must be stressed that no party challenging such legislation had to *prove* that the government's evidence was wholly invalid, or *prove* that the affected businesses had to win the case, they simply had to "cast doubt" on the challenged evidence.

In the instant action, the Eleventh Circuit simply ignored the vast evidence submitted to "cast doubt" on the County's evidence, and erroneously ignored the challenge to the core methodology, applicability, and quality of the County's evidence. The "purpose and effect of suppressing secondary effects" is meaningless, if the ***evidence*** relied on by the County is scientifically and/or methodologically flawed, and thus ***unreasonable*** to rely on. Simply stated, the Circuit Court decision eviscerates the "intermediate scrutiny" found to be the appropriate level of analysis for such legislation, as stated in *Erie, Alameda Books,*

and every prior Eleventh Circuit case dealing with challenges to adult entertainment legislation,2 reducing the scrutiny to a level lower than "rational basis," a level totally unacceptable in the context of First Amendment protected expression. In that the Petitioner challenged the very evidence relied upon by the County (clearly utilizing the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968)), it is obvious they ***did*** challenge whether the ordinances were designed to serve a substantial governmental interest, as well as every other ***reasonable*** application of the legislation. The Eleventh Circuit, in *Peek-A-Boo II*, not only ignores any countervailing evidence, it erroneously attacks the credibility of this countervailing evidence, something that should not be done at the summary judgment phase, and ***never*** done in the context of important First Amendment issues.

III. The Failure of The Eleventh Circuit to Adhere To The *Alameda Books* Decision and The Evidentiary Standard Articulated Therein Underscores The Conflict Among Circuit Courts and Their View Of the "Shifting Burdens" Established in That Decision

The Eleventh Circuit, in affirming the grant of summary judgment issued by the District Court, incorrectly overlooked the many unequivocal decisions ***from this Court*** which recognize the impropriety of

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2. *Flanigan's Enterprises, Inc, supra, Zibtluda, LLC v Gwinnett County*, 411 F.3d 1278 (11th Cir. 2005); *Fly Fish, Inc v City of Cocoa Beach*, 337 F 3d 1301 (11th Cir. 2003); *Lady J Lingerie, Inc v City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999); *Peek-A-Bool, supra, Krueger v City of Pensacola*, 759 F.2d 851 (11th Cir. 1985)

Ironically, in the case *sub judice*, the Eleventh Circuit noted the import of different factual records: "The facts addressed in *Daytona Grand* and *Flanigan's II* were significantly different than those found in *Krueger* and *Flanigan's I*, so not surprisingly, the outcomes in these cases were different, although the legal principles were the same." At 1361. What better statement could there be as to the inappropriateness of summary judgment?

Ultimately, the Eleventh Circuit, clearly underscoring the conflict among the Circuit Courts dealing with these evidentiary issues, has now created some kind of "super-burden" for adult entertainment businesses to establish "genuine issues" in the context of challenges to legislation restricting such First Amendment protected businesses. Essentially, the Eleventh Circuit's opinion would require adversely affected parties to *prove* that "the particular businesses of appellants had not caused such secondary effects," ***prior*** to any actual trial. This improper weighing of evidence is the direct result the endless conflict caused by misinterpretations of the *Alameda Books* decision, and the granting of this Petition could eliminate this and future deprivations of due process occasioned by the manipulation of that decision.

The position articulated in *Daytona Grand* reveals just how far from "intermediate scrutiny," or any modicum of due process the Eleventh Circuit has gone:

> To be sure, as the *Alameda Books* plurality admonished, the City cannot "get away with shoddy data or reasoning," and its evidence must "fairly support" its rationale. *See* 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). But this

> is simply another way of saying that the City's reliance on evidence supporting its rationale must be *reasonable*. Anecdotal evidence is not "shoddy" *per se*. At most, Lollipop's experts' studies suggest that the City *could* have reached a different conclusion during its legislative process about the relationship between adult theaters and negative secondary effects. But demonstrating the possibility of such an alternative does not necessarily mean that the City was barred from reaching other reasonable and different conclusions. *See G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 639 (7th Cir.2003) ("Although this evidence shows that the [town] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [town's] legislative process."); *see also Alameda Books*, 535 U.S. at 437, 122 S.Ct. 1728
>
> [490 F.3d 882]

Misapplying the *Alameda Books* decision, the Eleventh Circuit would now reject *any* challenge to adult entertainment legislation, if a local government can simply show that it was "reasonable," no matter how shoddy or methodologically flawed the data it relies on. This is, by no means, the "intermediate scrutiny" called for in *Alameda Books*. It establishes no scrutiny at all. This same flawed reasoning has found its way into every Eleventh Circuit

adult use decision since *Daytona Grand*,[3] and is clearly evident in the case *sub judice*:

> On this record, we are satisfied that the County has met its initial burden and that Peek-a-Boo has failed to cast direct doubt. While the County "cannot rely on shoddy data or reasoning," *Peek-a-Boo I*, 337 F.3d at 1269, it is not required to "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the [County] relie[d] upon is reasonably believed to be relevant to the problem that the [County] addresses," *Renton*, 475 U.S. at 51-52. Nor was the County required to produce empirical evidence or scientific studies as long as it "advance[d] some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."*Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring in the judgment). Here, the County relied on a vast legislative record that included judicial opinions, reports and studies that had been prepared for other municipalities, testimony from expert witnesses, affidavits from a private investigator who visited sexually oriented

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3 *Peek a Boo Lounge II, Galardi v City of Forest Park*, N.D. Ga. Case No. 1:09-CV-965-RWS, 12/10/10, 12/16/10, 1/13/11, *Flanigan's [III] Enterprises, Inc of Georgia, v Fulton County, Georgia*, 596 F.3d 1265 (11th Cir 2010); *Peek a Boo Lounge of Bradenton v Manatee County*, 2009WL4349319 (M.D. Fla. 2009).

> businesses in Manatee County, and newspaper articles. It is undeniable that the County has made a substantial showing, relying on as thorough a record as we have seen in these cases, and far more than the "very little evidence" required under *Alameda Books*. 535 U.S. at 451 (Kennedy, J., concurring in the judgment). Moreover, Peek-a-Boo has failed to cast direct doubt on the totality of the County's evidence.

See App. A, pp. 18a-19a.

Under this theory, an affected business has to "cast doubt" by meeting some arbitrary and unknown burden, obviously more than a "preponderance," and under circumstances that make any hope of the true application of "intermediate scrutiny" a distant dream. This reasoning also requires an improper weighing of evidence and an improper evaluation of the credibility of expert witness reports. This has never been appropriate, and the Eleventh Circuit's rejection of essentially mountains of conflicting expert opinion can not be reconciled with summary judgment evaluations in virtually every other context. Other than this apparent "adult entertainment" exception improperly crafted by the last several Eleventh Circuit decisions, expert evidence normally ***will not*** constitute sufficient support for a motion for summary judgment and will be more useful as a means of raising an issue of fact, since the weight to be given expert evidence is normally an issue for the trier of fact. This has been the state of the law for decades. See *Elliot v. Mass. Mut. Life*, 388 F.2d 362 (5th Cir. 1968); *Webster v. Offshore Food Service*, 434 F.2d 1191 (5th Cir. 1970), cert. den. 404 U.S. 823.

Accordingly, the law would dictate that a motion for summary judgment ***must*** be denied where affidavits present a credibility contest between the parties' expert witnesses on a relevant issue, or where there is a necessity of expert testimony to translate and interpret technical facts which are material. See *Scharf v. United States Atty. Gen.*, 597 F.2d 1240 (9th Cir. 1979), and *Sonobond Corp. v. Uthe Technology, Inc.*, 314 F. Sup. 878 (ND Cal 1970). By critically evaluating the Petitioner's expert's affidavits and the "record," where the only criteria utilized is whether "the County has met its initial burden and Peek-A-Boo has failed to cast direct doubt," this is undeniably a complete example of improper credibility determinations.

The confusion over applying the *Alameda Books* case and the apparently "optional" and sporadic allowance of any proper evidentiary analysis of the "burden shifting" procedure articulated in that case has been repeatedly complained about by many courts. For example, one court articulated the problem as follows:

> [This]... presents an issue that has ***often been litigated in the courts of this nation***: when and to what extent may the government regulate an adult use.../***R]esolution of this issue is complicated by court's inability to articulate a clear set of principles to govern cases such as these.***

XLP Corp. v. Lake County, 359 Ill. App. 3d 239, 832 N.E.2d 480 (Ill. App. 2d Dist. 2005).

Through this action, Petitioner seeks to have this Court establish an unequivocally "***clear set of principles.***"

and to establish an appropriate evidentiary framework for the courts, not only in the Eleventh Circuit, but in every other court in the Country that must deal with these issues. This Court should grant the Petition and craft a workable framework where some modicum of the rules of evidence are applied to "secondary effects" challenges. Petitioner clearly seeks a way to ensure that all courts apply ***consistently*** and with ***precision*** a minimum of evidentiary fairness in this controversial, frequently litigated and critical area of Free Speech. This is required by the barest modicum of both the equal protection doctrine and substantive due process. Petitioner also urges this Court to grant review to reconcile the monumental conflict between the Federal Circuit Courts in their application of *Alameda Books*, and its state and lower Federal progeny, and to ensure the advent of a day when such evidentiary evaluations will be constitutionally consistent.

Unfortunately, despite this Court's best attempts, the state of the law is in chaos. More than one court has complained that guidance from this Court on this issue has been somewhat less than clear, and the courts have complained that they must begin their analysis by setting forth the law in the best fashion they can from applicable precedent, noting that doing so is very difficult. Many courts are virtually crying out, almost directly, for the necessity of this Court to enunciate a clear evidentiary standard, eliminating any question, and eliminating any "nebulous state of the case law" that would interfere with the consistent and properly guided evaluation of similar issues by the courts everywhere these issues frequently arise. If the number of cases where identical concerns are articulated does not inspire this Court to accept review of this matter, then countless courts will be inevitably destined to evaluate similar challenges regarding the

critical issues presented by the instant action, and relegated to the same evidentiary chaos that has resulted from either an inability or a flat refusal to properly apply *Alameda Books*, all at a grave cost, not only to liberty, but to the preservation of the Rule of Law.

IV. This Court Has Historically Shown a Desire to Protect the First Amendment, Even in Areas of Great Controversy, and Should Do So in this Action

From a historical perspective, this Court has consistently shown a desire to protect the First Amendment, even, and sometimes particularly, in areas of great controversy. As this Court has stated, there is a presumption that any governmental restraint on expressive conduct is impermissible. *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239 (1975). The *Alameda Books* decision and the articulation of the "burden shifting" procedures articulated therein, was not entirely unprecedented. Early on, ***simply applying the rules of evidence***, this Court held that, once a party demonstrates that a regulation deprives it of protected freedom of expression, the burden shifts to the governing body to justify that infringement. See *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803, 104 S. Ct. 2118 (1975). To address the issue from its most basic starting point, any form of legislation restricting any businesses deemed to be "adult entertainment" must be analyzed under the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest,

established by *evidence* showing the existence of problems that would be favorably addressed by the legislation, to prevent the so-called "adverse secondary effects" *shown to exist*, that were allegedly engendered by adult entertainment establishments. *Young, supra, Renton, supra.* In the Eleventh Circuit, a requirement of this concept was that the existence of these adverse secondary effects be *established* through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982). *Alameda Books* was not the first case to identify this fundamental requirement. Under the clear mandates of the law articulated in *Alameda Books*, it is a fundamental concept of law to make sure that the restrictions imposed by legislation are actually supported by the evidence trying to establish the existence of an otherwise unremediated governmental interest.

Justice Souter's dissent in *Alameda Books*, while not agreed with by all justices, is really nothing more than an articulation of the rules of evidence in the evaluation of challenges to "secondary effects" accusations against adult oriented businesses. The variations about ***what can be considered as evidence***, and what level of scrutiny should be applied, is, unfortunately but truthfully, "all over the road." *Alameda Books*, more than anything else, articulated that there could be a minimal burden for acceptable "legislative evidence," but, once challenged, the government had to carry its burden with evidence of "equal dignity," competent and substantial, if not rising to the level of *Daubert*. 4

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4. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, (1993), the benchmark case wherein this Court put strict limits on the admissibility of "junk science" into evidence. In all

Problems arise because, while virtually every court evaluating the *Alameda Books* case has found that Justice Kennedy's concurrence should be recognized as the decisive holding in that case,5 there is a clear conflict in the way that the various courts dealing with these issues have attempted to apply the *Alameda Books* decision to their respective actions.

Even though there is agreement on who articulated the "holding" of *Alameda Books*, there is ***no agreement*** as to what type of evidence is relevant, or what that "burden" actually is, after it "shifts." Establishing that the rules of ***evidence*** apply in every judicial proceeding would take only a simple pronouncement from this Court, since these rules must be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that *the truth may be ascertained* and proceedings *justly administered*." FRE 102, emphasis added. As will be shown in the following section, that "search for the truth" can depend on what jurisdiction you are in, and this fact alone precludes ***any*** possibility that any such proceedings will be "justly administered."

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fairness, as Justice Souter articulated in his dissent in *Alameda Books*, if there is a "science" that lends itself to the evaluation of the veracity of a given issue, wouldn't the "search for the truth" be aided by its use?

5. *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir 2003); *S O B , Inc v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *Peek-A-Boo I, G M Enterprises, Inc v Town of St Joseph*, 350 F.3d 631 (7th Cir. 2003).

Finally, most of the courts that are antagonistic to challenges to adult entertainment legislation appear to impose a "higher" evidentiary burden on adult businesses when utilizing the "burden shifting" procedures set forth in *Alameda Books*. Such an approach is totally improper. Since all these cases deal with ***civil matters***, the burden is "***preponderance of the evidence,***" a fact lost on many courts dealing with these issues. *See Bourjaly v. United States*, 483 U.S. 171, 175, (1987). Acceptance of this action for review can end this inappropriate practice.

V. The Ability of Local Governments to Rely on Prior Supreme Court and Federal Decisions Makes Any Evidentiary Challenge Illusory, As Shown By the Split Of Authority on This Issue

Another problem identified in *Peek-A-Boo II* is the fact that there is really no meaningful way to "challenge the findings" of prior judicial decisions, which are often recited *ad nauseam* to give the appearance of validity to any recited "rationale and findings." As articulated in the Eleventh Circuit opinion below:

> In support of its rationale, the County first has cited to the findings and interpretations of eight Supreme Court decisions and seventeen other federal and state court decisions. (Footnote omitted). Many of the cases upheld ordinances containing restrictions similar to those found in Ordinance 05-21, and many of them except the legislative findings concerning the negative secondary effects of adult businesses. *See, e.g., Barnes*, 501 U.S. at 572 (upholding requirement that dancers in adult establishments wear

> pasties and a G-string); *California v. LaRue*, 409 U.S. 109, 118-19 (1972) (upholding prohibitions on nude dancing in establishments that serve alcohol); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1365-66 (11th Cir. 1999) (upholding a requirement that adult establishments have an area of at least 1,000 square feet). Indeed, the Supreme Court has suggested in *Pap's A.M.* that a municipality may meet its initial burden solely by relying on relevant Supreme Court cases. 529 U.S. at 296-97.

App. A at pp. 19-20.

How can any party effectively "challenge the findings" of a prior decision, or attempt to "cast doubt" on an evidentiary record that, in some cases does not exist (*See, e.g., Barnes*), and, in every case, is beyond evaluation and challenge. This invitation to "hide the ball" provides an "out" to any court not wanting to give an affected business any meaningful opportunity to mount any type of challenge, through expert opinion or otherwise and essentially creates an "irrebuttable presumption," something that is totally inappropriate in the context of First Amendment challenges.

The Fifth Circuit, following *Alameda Books*, in its first opinion in *Encore Videos v. City of San Antonio*, 310 F.3d 812 (5th Cir. 2002); modified on denial of petition for rehearing, at *Encore Videos v. City of San Antonio*, 330 F.2d 288 (5th Cir. 2003), properly disposed of the "irrebuttable presumption of secondary effects" alleged in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 685

(10th Cir. 1998) and *ILQ Investments v. City of Rochester*, 25 F.3d 1413 (8th Cir 1994): "The Tenth and Eighth Circuit decisions do not give the present ordinance much support. Both are highly conclusional in their analysis and make little effort to justify their conclusions by reference to authority. ..."

Irrebuttable presumptions are anathema to the "search for the truth," and repugnant to any legitimate analysis under a modicum of evidentiary rules. They have no place in challenges involving First Amendment issues, and this Court can utilize this case to establish this jurisprudential doctrine with finality.

As identified by Justice Souter in *Alameda Books*, there is both a reliable and "just" method to "test the hypothesis" of whether or not "adult uses," cause adverse secondary effects. This method of testing the hypothesis is more fairly the search for "the truth" with regard to specific ***types*** of adult uses. The catchall term: "Adult Use" is not a useful term when the only common denominator of "adult businesses" in most legislation is the presumed content of expression at issue. This is a denominator that is virtually useless when it is used to lump together multi-million dollar dance cabarets with shabby store front massage parlors, small adult bookstores, and premises that deal only with "off premises" consumption of expressive fare.

There are scores of decisions that are based on an entirely different understanding of the required evidentiary burdens. The decisions which essentially ignored the presentation of *evidence* "casting doubt" on the findings upon which various adult use restrictions

have been based, include: *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2003); *Worldwide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004); *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th Cir. 2003); *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672 (W.D. Kentucky 2002); *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *N.W. Enterprises v. City of Houston*, 352 F.3d 162 (5th Cir. 2003); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington*, 2004 WL 1779014 (N.D. Texas 2004); and *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006). These cases represent just a sample of how various courts, attempting to apply *Alameda Books*, have completely misapplied any evaluation of evidentiary "challenges." Emphasizing this enormous and irreconcilable conflict, there are ***scores of other decisions misconstruing*** *Alameda Books* – this is a problem of huge constitutional significance.

The significance of these misconstructions is underscored by those decisions that actually show an understanding of *Alameda Books*, and allow the ***rules*** of evidence to be utilized in evaluating countervailing ***evidence*** and invalidating unsupported legislation, when justified by a proper evaluation of ***the truth***. Of the cases that "get it right," the clearest was *Peek-a-Boo I*, another case where the court complains that any assessment of evidence is difficult, "because of the large number of no-clear-majority decisions of the Court in cases of this type...." *Id.* at 1254.

Abilene Retail # 30 v. Board of Commissioners of Dickinson County, 492 F.3d 1164 (10th Cir. 2007), rehearing and rehearing *en banc* denied 508 F.3d 958 (10th Cir. 2007) 508 F.3d 958 (10th Cir. 2007) (urban studies do not permit summary judgment for rural county);

Encore Videos, supra:

> "The city justifies this ordinance on the ground that it will reduce the adverse secondary effects [such as increased crime and the reduction of property values] of sexually oriented businesses. Therefore, in order to demonstrate that the ordinance is narrowly tailored, the city must show that the ordinance addresses these problems."

R.V.S v. City of Rockford, 361 F.3d 402 (7th Cir. 2004)

> "At this stage, courts are 'required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' *Ben's Bar*, 316 F.3d at 724 [quoting *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728]. In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection,

courts must 'examine evidence concerning regulated speech and secondary effects.' *Alameda Books*, 535 U.S. at 441, 122 S.Ct. 1728.").

22nd Ave Station, Inc. v. City of Minneapolis, 429 F.Suppp.2d 1144 (D.Minn. 2006)

"As the Supreme Court explained in *Alameda*, even if the City has made a facially sufficient factual showing to justify its ordinance, the affected party may cast direct doubt on the City's rationale by showing that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings...If the affected party succeeds in casting direct doubt, 'the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.' Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability of the foreign studies upon which the City relied. It has submitted its own recent expert analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat. The City has provided no contrary evidence regarding the impact of 22nd Avenue Station on its neighborhood."

Flanigan's Enterprises Inc. v. Fulton County, 2006 WL 2927532 (N.D. Ga. 2006) (reversed, *Flanigan's III*, *supra*.

> "Fulton County has failed to show that the ordinance furthers an important governmental interest because it did not consider the most comprehensive analysis of the secondary effects of alcohol consumption in adult entertainment establishments. Instead, the defendants, relied on less relevant studies that supported the county's goal. Once again, this court concludes that it was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies; therefore, the ordinance is an unconstitutional restraint on the plaintiffs' constitutional rights under the First Amendment."

Recently, a series of decisions authored by Chief Judge Easterbrook for unanimous panels of the Seventh Circuit also "got it right:" *See Annex Books v. City of Indianapolis*, 581 F.3d 460, (7th Cir. 2009); *New Albany DVD v City of New Albany*, 581 F.3d 556 (7th Cir. 2009) and *Annex Books v. City of Indianapolis*, 624 F.3d 368 (7th Cir. 2010). As the above excerpts show, the decisions construing the "shifting burden" of *Alameda Books* are truly "all over the road." What has resulted is exactly what Justice Souter feared, when he articulated his concerns with the haphazard, inconsistent and confusing evaluation (or lack thereof) of ***relevant evidence*** under ***appropriate evidentiary standards***. Those fears were well articulated, and have come to be, and they are adopted by the Petitioner as a very legitimate basis to accept review of the Petition:

"In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available... See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young*, 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation...

"Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market value, all of which are within a municipality's capacity or available

from the distilled experiences of comparable communities. See, *e.g.*, *Renton*, *supra*, at 51, 106 S.Ct. 925; *Young*, *supra*, at 55, 96 S.Ct. 2440.

"And precisely because this sort of ***evidence*** is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. *See Erie v. Pap's A.M.*, 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.*, at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. *See Renton*, 475 U.S., at 51, 106 S.Ct. 925; *Young*, *supra*, at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

> "The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. See, *e.g.*, *Schad v. Mount Ephraim*, 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). "

Alameda Books, supra, Souter, J., (joined by Ginsburg, J. and Stevens, J.,) dissenting, 535 U.S. at 458, 459.

What is clear is that the instant action shows, perhaps more than any other, that a governmental body, insistent on advancing a perhaps well intended but questionably useful regulation that simply eliminates lawful speech under the cloak of advancing some nebulous "governmental interest" can "pick and choose" what type of "evidence" it relies on in an effort to uphold legislation based, not on any legitimate concern with "secondary effects," but rather with a content-based and discriminatory animus. Absent review and guidance, the same miscarriage of justice represented by the instant action is destined to be repeated, at the expense of the businesses involved, their employees, their families and, most critically, at the expense of freedom.

CONCLUSION

The manipulation of this Court's decision in *Alameda Books* has resulted in significant violence to the First Amendment, destroying both First Amendment rights and property rights under the guise of remedial legislation. Taking advantage of stereotypes and amassing a "record" of methodologically flawed data, impenetrable prior judicial decisions, and subjective anecdotal accounts,

the Eleventh Circuit has issued a sequence of adverse decisions that reduce the "intermediate scrutiny" applicable to challenges of legislation such as this to less than a "rational basis" standard. This failure to reign in this departure from the Rules of Evidence has resulted in a denial of due process and the imposition of regulations that invariably result in the closure and loss of long standing "going concerns," regulated out of existence, not for any advancement of any "governmental interest," but to restrain controversial speech manifest in adult dancing establishments. The Peek-A-Boo Lounge has operated virtually problem free since 1978. It is manifestly unjust to force the closure of this business on the basis of questionable studies that prove only that places of public assembly attract activity. Clearly, leaving the misinterpretations of *Alameda Books* unchecked has led to a state of confusion and chaos. For these reasons, Petitioner respectfully submits the foregoing considerations in support of the instant Petition. It is respectfully requested that this Court grant review in this action.

Respectfully Submitted

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED JANUARY 21, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-16438

D. C. Docket No. 05-01707-CV-T-27TBM

PEEK-A-BOO LOUNGE OF BRADENTON, INC., a Florida Corporation d.b.a. Peek-A-Boo Lounge,

Plaintiff-Appellant,

versus

MANATEE COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

(January 21, 2011)

Before HULL and MARCUS, Circuit Judges, and COOKE,* District Judge.

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* Honorable Marcia G. Cooke, United States District Judge for the Southern District of Florida, sitting by designation.

Appendix A

MARCUS, Circuit Judge:

At issue today is the constitutionality of an ordinance that the Manatee County, Florida Board of County Commissioners ("the Board") adopted to regulate sexually oriented businesses in Manatee County ("the County"). Peek-a-Boo Lounge of Bradenton, Inc. ("Peek-a-Boo"), an adult dancing establishment in Manatee County, along with two similar establishments,[1] sued the County claiming that the ordinance violated the First Amendment. Peek-a-Boo appeals the district court's grant of summary judgment in favor of the County. After thorough review of the ordinance and the extensive record surrounding its codification, we agree with the district court that the County's ordinance was reasonably designed to serve a substantial government interest --reducing the negative secondary effects associated with sexually oriented businesses. Accordingly, we affirm.

I.

The story begins in 1987, when Manatee County adopted an "Adult Entertainment Code," Ordinance 87-07 (not at issue today), which rendered then-existing adult dancing establishments Peek-a-Boo and M.S. Entertainment, Inc. ("M.S.") nonconforming. Peek-a-Boo and M.S. filed suit in the United States District Court for the Middle District of Florida challenging the ordinance's

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1. The other two adult dancing establishments, M.S. Entertainment, Inc. and G T. Management, Inc , originally joined the appeal but abandoned it before the case came before us.

constitutionality under the First Amendment. But in 1989, the parties settled their dispute, allowing the two establishments to continue running and enjoining the County from enforcing the ordinance against them for the way they then operated.

In November 1998, the County amended the Adult Entertainment Code, this time enacting a zoning ordinance, Ordinance 98-46 (also not at issue today), which set forth specific physical requirements for the premises of adult dancing establishments. Peek-a-Boo and M.S. again found themselves in violation of the Adult Entertainment Code. Four months later, the County also adopted a generally applicable public nudity ordinance, Ordinance 99-18. This ordinance defined "nudity" broadly, to include the wearing of any opaque swimsuit or lingerie covering less than one-third of the buttocks or one-fourth of the female breast. The ordinance also specifically prohibited erotic dancers and others from appearing in public in "G-strings, T-backs, dental floss, and thongs."

Peek-a-Boo and M.S. again sued the County, challenging the constitutionality of both ordinances on First Amendment grounds. The district court concluded that the ordinances were constitutional and granted summary judgment in favor of the County. A panel of this Court, however, reversed, holding that the zoning ordinance violated the First Amendment and that there were genuine issues of material fact concerning whether the public nudity ordinance furthered the County's interest in curbing the negative secondary effects associated with adult entertainment. *Peek-a-Boo Lounge of Bradenton,*

Inc. v. Manatee Cnty., 337 F.3d 1251, 1268-69, 1274 (11th Cir. 2003) ("*Peek-a-Boo I*"). Essential to our finding that the ordinance was unconstitutional, we observed that the Board "failed to rely on any evidence whatsoever that might support the conclusion that the ordinance was narrowly tailored to serve the County's interest in combating secondary effects." *Id.* at 1266. We also found that, while the County relied on some evidence to meet its initial burden in adopting Ordinance 99-18, the public nudity ordinance, the plaintiffs had then met their burden of submitting evidence sufficient to "cast direct doubt" on the County's rationale. *Id.* at 1271-72. Accordingly, we remanded the case to the district court for a determination of whether there remained credible evidence upon which the County could reasonably rely to support its stated rationale for the public nudity ordinance. *Id.* at 1274-75.

After the *Peek-a-Boo I* decision, the County completely overhauled its Adult Entertainment Code. It enacted Ordinance 05-21[2]--the ordinance at issue today -- renaming the code the "Sexually Oriented Business

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2. The relevant portions of the ordinance provide:

> Sec. 2-2.5-2. Definitions.
>
> . . . .
>
> "*Nude*," "*Nudity*" or "*State of Nudity*" means the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola.

Appendix A

. . . .

"*Semi-Nude*" or "*State of Semi-Nudity*" means a condition in which a person is not nude, but is showing a majority of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or is showing the majority of the male or female buttocks.

. . . .

"*Sexually Oriented Business*" means an "adult bookstore," an "adult video store," an "adult cabaret," an "adult motel," an "adult motion picture theater," a "semi-nude model studio," a "sexual device shop," or a "sexual encounter center."

. . . .

Sec. 2-2.5-13. Hours of Operation.

No sexually oriented business, other than an adult motel, shall be or remain open for business between 2:00 a.m. and 6:00 a.m. on any day.

. . . .

Sec. 2-2.5-16. Penalties and enforcement.

(a) A person who knowingly violates, disobeys, omits, neglects, or refuses to comply with any of the provisions of this chapter shall, upon conviction, be punished by a fine in an amount not less than $250.00 and not to exceed $500.00, or imprisonment, in the County Jail for a period not to exceed sixty (60) days, or both. Each day a violation is committed, or

Code," and establishing a different set of regulations to govern the manner in which sexually oriented businesses operate in the County. The new ordinance contains both zoning and public nudity provisions.[3] The zoning

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business, appear in a semi-nude condition unless the person is an employee who, while semi-nude, remains at least six (6) feet from any patron or customer and on a stage that is at least eighteen (18) inches from the floor and in a room of at least one thousand (1,000) square feet.

(c) It shall be a violation of this ordinance for any employee who regularly appears semi-nude in a sexually oriented business to knowingly or intentionally, in a sexually oriented business, touch a customer or the clothing worn by a customer.

(d) It shall be a violation of this ordinance for any person to sell, use, or consume alcoholic beverages on the premises of a sexually oriented business. A sexually oriented business currently licensed to sell alcoholic beverages on the premises shall not be required to comply with this requirement until expiration of its current annual alcoholic beverage license.

A sign in a form to be prescribed by the County Administrator's Office and summarizing the provisions of Subsections (a), (b), (c), and (d) of this Section, shall be posted near the entrance of the sexually oriented business in such a manner as to be clearly visible to patrons upon entry.

3. The new ordinance replaced the previous zoning ordinance, Ordinance 98-46, and exempted sexually oriented businesses from the generally applicable public nudity ordinance, Ordinance 99-18, rendering the prior action -- *Peek-a-Boo I* -- moot.

provisions include physical requirements for the premises of sexually oriented businesses, restrictions on their hours of operation, and a prohibition on serving alcoholic beverages. Manatee County, Fla., Code of Ordinances §§ 2-2.5-4 - 2-2.5-18 (2005). The nudity provisions include an across-the-board ban on appearing in a "state of nudity," *id.* § 2-2.5-18(a), defined as "the showing of the human male or female genitals, pubic area, vulva, or anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola," *id.* § 2-2.5-2. The ordinance allows employees of sexually oriented businesses to appear "semi-nude," *id.* § 2-2.5-18(b), defined as "a condition in which a person is not nude, but is showing a majority of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or is showing the majority of the male or female buttocks," *id.* § 2-2.5-2. Employees appearing semi-nude, however, must "remain[ ] at least six (6) feet from any patron or customer and on a stage that is at least eighteen (18) inches from the floor and in a room of at least one thousand (1,000) square feet." *Id.* § 2-2.5-18(b). Employees are prohibited from touching customers or customers' clothing. *Id.* § 2-2.5-18(c).

Unlike when the County adopted Ordinances 98-46 and 99-18, this time the County relied on a voluminous record that included judicial opinions; multiple secondary-effects reports, including land-use studies and crime reports; affidavits from a local private investigator and from local police; newspaper articles; and other materials. The County conducted a four-hour public hearing at which

experts testified both for and against the ordinance. In support of the County's proposal, Richard McCleary, Ph.D., a professor of criminology, and Shawn Wilson, a real estate appraiser, testified about the adverse secondary effects associated with sexually oriented businesses. In opposition, the Plaintiffs offered the testimony of four experts: Randy D. Fisher, Ph.D., an associate professor of psychology; Terry A. Danner, Ph.D., a professor of criminal justice; Judith Lynne Hanna, Ph.D., a scholar of anthropology and dance; and Richard Schauseil, a licensed real estate agent. We detail the evidential foundation at some length because it stands at the heart of whether the County relied on a sufficient record.

Dr. McCleary testified that much of the evidence supported the County's rationale. He explained that the formal criminological literature revealed consistent findings of significant crime-related hazards caused by sexually oriented businesses. These findings led him to conclude that "the relationship between crime and sexually oriented businesses is . . . a scientific fact." One reason, he offered, is that sexually oriented businesses attract "soft targets," meaning patrons who are easy crime targets because they often come from far away, do not know the neighborhood, try to remain anonymous, and are less likely to report crimes of borderline seriousness because they do not want anyone to know that they are patronizing such businesses. Another reason Dr. McCleary offered is that features of the physical layout of these businesses --including private rooms and narrow corridors --strongly inhibited surveillance and policing.

Dr. McCleary also explained that there were between one and two dozen studies establishing a correlation between sexually oriented businesses and negative secondary effects that were "scientific to some degree." Dr. McCleary highlighted two such studies that supported the County's findings that sexually oriented businesses cause negative secondary effects. In the first one from Garden Grove, California, Dr. McCleary and a colleague examined locations where new sexually oriented businesses had opened up and compared the crime rates one year before and one year after they opened, using existing sexually oriented businesses as controls. They found a far greater increase in crime during that time period surrounding the new sexually oriented businesses than surrounding the existing similar businesses. In the second study drawn from Greensboro, North Carolina, even though the study's authors concluded that sexually oriented businesses did not cause negative secondary effects, Dr. McCleary said that another look at their data showed significantly higher rates of crime in neighborhoods with sexually oriented businesses.

Shawn Wilson, a real estate appraiser, testified about the negative effects of sexually oriented businesses on property value. Ms. Wilson explained that she had examined studies drawn from other cities on the secondary effects associated with sexually oriented businesses and that all of the studies addressing the value of real estate concluded that there were, in fact, negative secondary effects. Ms. Wilson also looked at the deeds in her own files, spoke with market participants, and met with other real estate appraisers. Although she acknowledged that these conversations amounted to anecdotal evidence,

she concluded that there was a palpable fear in the marketplace that sexually oriented businesses, like other undesirable businesses such as flea markets and bowling alleys, would drive away potential customers and adversely affect business.

Dr. Fisher, an associate professor of psychology, testified on behalf of the Plaintiffs that the foreign studies on which the County had relied were flawed. He said that five of the studies were not empirically grounded, six did not actually find evidence of negative secondary effects, and two involved samples that were too small to be considered. He conceded that five of the foreign studies supported the hypothesis that sexually oriented businesses caused negative secondary effects, but he suggested that each of them contained methodological flaws that rendered the results "virtually uninterpretable." Finally, he critiqued two studies Dr. McCleary had personally conducted --the Garden Grove study, as well as a 2004 study of Centralia, Washington. Dr. Fisher argued that Dr. McCleary was not actually measuring crime increases surrounding *new* sexually oriented businesses, because some of these new businesses had opened near *existing* sexually oriented businesses.

Dr. Danner, a criminal justice professor, testified that a study he conducted concluded that Manatee County's sexually oriented businesses did not cause increases in crime. He evaluated two kinds of crime data in the County: (1) calls for police service, and (2) crimes known to police. He compared crime data for the neighborhoods surrounding Peek-a-Boo Lounge and Cleopatra's (the name of the adult dancing establishment of the former

Plaintiff M.S.) with crime data from other parts of the County. He found that Cleopatra's had significantly fewer incidents of the categories of crime he studied compared to the average for Manatee County, and that Peek-a-Boo had significantly more incidents of those crimes compared to the average. Because Peek-a-Boo had more crime than the County average and Cleopatra's had less crime than the County average, and because he found that other kinds of businesses are also correlated with negative secondary effects, Dr. Danner argued that sexually oriented businesses were not "uniquely criminogenic."

Dr. Hanna, an anthropology and dance scholar, also spoke on the Plaintiffs' behalf. She opined that the ordinance was not content neutral and would suppress speech by depriving dancers of "artistic choice." She offered that nudity and the touching of patrons are essential components of adult dance and that the ordinance "stigmatizes women."

Next, Mr. Schauseil, a real estate agent, testified about a study he had conducted regarding property value. He found that from 2000 to 2004, the majority of businesses in the neighborhood of Cleopatra's and Peek-a-Boo Lounge saw no change in traffic pattern and the traffic volume had, in fact, increased.

Finally, Robert Miller, a Manatee County resident who had worked at Cleopatra's for two years and at Peek-a-Boo Lounge for eleven years, testified. He claimed that Peek-a-Boo did not tolerate drugs, prostitution, or violence; that there had been few "legal incidents"; that

Peek-a-Boo was in good standing with the community; and that the establishment contributed significantly to the economy.

Based on the evidence and testimony, the Board concluded that sexually oriented businesses were correlated with a variety of negative secondary effects, including personal crimes, property crimes, prostitution and other illicit sexual activity, spread of disease, drug use and drug trafficking, sexual assault and exploitation, negative impacts on surrounding properties, and litter. Manatee County, Fla., Code of Ordinances § 2-2.5-1(b)(1). The Board found that the County had a substantial interest in preventing and abating these secondary effects,and therefore adopted the ordinance "to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County." *Id.* § 2-2.5-1(a).

On September 12, 2005, three adult dancing establishments filed the instant action: the two plaintiffs from the previous action, Peek-a-Boo and M.S., and G.T. Management, Inc. ("G.T."). Again, the Plaintiffs claimed that the ordinance was unconstitutional on its face and as applied to them. The County moved for summary judgment, submitting six volumes of evidence, which included the testimony and reports of Dr. McCleary, Shawn Wilson, and the Plaintiffs' witnesses; twenty-five judicial opinions; twenty studies from other jurisdictions; deposition testimony; affidavits; and post-enactment

evidence. In particular, the County submitted affidavits from Tom McCarren, who visited Peek-a-Boo Lounge, Paper Moon,[4] and Pandora's Box[5] and described in detail illegal activity taking place in these establishments.[6]

The County also submitted an affidavit from Detectives Evelio Perez and Dave Ackerson of the County Sheriff's Office, who conducted an undercover operation at Cleopatra's. They averred that the sting revealed several liquor violations, including serving alcohol after hours, dealing in stolen property, and vending goods with a counterfeit trademark. The County also submitted newspaper articles about stings in North Miami Beach and Pasco County. These articles detailed the illegal acts purportedly taking place in the adult clubs, including exposure of bodily organs on stage, simulation of sexual acts, and drug possession. The County also submitted a report about erotic dancers' experiences in adult clubs, which claimed that there was evidence of physical abuse, sexual abuse, verbal abuse, stalking, and sexual

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4. The name of the adult dance establishment of the former Plaintiff G.T.

5. The new name of the adult dance establishment of the former Plaintiff M.S., formerly Cleopatra's.

6. At Pandora's Box, Mr. McCarren was able to pay a dancer for a private dance, during which the dancer removed the tape over one of her nipples and allowed Mr. McCarren to touch her breast, buttocks, and genital area. At Paper Moon, Mr. McCarren was able to pay a dancer to go into a back room with him, where she removed all clothing except her G-string and allowed Mr. McCarren to touch her breasts.

exploitation. In response, the Plaintiffs offered affidavits from the four witnesses whose testimony had been presented to the Board, and argued that their evidence "cast direct doubt" on the County's rationale for the ordinance. Ultimately, the district court granted final summary judgment for the County. All the Plaintiffs timely appealed, and the County cross appealed from the district court's refusal to strike the Plaintiffs' affidavits on the grounds that they contained legal argument and previously undisclosed expert opinion. Two of the Plaintiffs (M.S. and G.T.) have since dropped their appeal, leaving only Peek-a-Boo as a party Plaintiff.

II.

We review a district court's order granting summary judgment *de novo*, "applying the same standard that bound the district court and viewing the evidence and all reasonable inferences in the light most favorable to" the non-moving party. *Rodriguez v. Sec'y for Dep't of Corr.*, 508 F.3d 611, 616 (11th Cir. 2007). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of production. *Fickling v. United States*, 507 F.3d 1302, 1304 (11th Cir. 2007). The constitutionality of a statute is a question of law we review *de novo*. *Peek-a-Boo I*, 337 F.3d at 1255.

In *Peek-a-Boo I*, a panel of this Court comprehensively summarized the Supreme Court's jurisprudence on the First Amendment right to freedom of expression

in the context of adult entertainment. *Id.* at 1255-64. Among other things, we held that adult entertainment zoning ordinances and generally applicable public nudity ordinances "must be distinguished and evaluated separately" according to the respective standards established by the Supreme Court. *Id.* at 1264. Zoning ordinances that regulate the conditions under which sexuallyoriented businesses may operate are evaluated as time, place, and manner regulations, following a three-part test set forth by the Supreme Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-50 (1986) and reaffirmed in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002). [7] Content-neutral public nudity ordinances, by contrast, involve expressive conduct and must therefore be measured against a four-part test set forth in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), and applied in the context of adult entertainment in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991), and in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000). Manatee County Ordinance 05-21 contains provisions that regulate zoning and portions that are generally applicable public nudity restrictions. In this case, however, it's unnecessary to analyze these provisions separately because Peek-a-Boo challenges on appeal only whether the

7. There was no majority opinion in *Alameda Books*, but because Justice Kennedy's concurrence reached the judgment on the narrowest grounds, his opinion represents the Supreme Court's holding in that case. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds" (internal quotation marks omitted)).

ordinance is "designed to serve a substantial government interest."[8] Therefore, we measure the zoning and nudity portions of the ordinance against the same standard: is the ordinance reasonably designed to serve a substantial government interest?

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8. Under the *Renton* test applicable to *zoning ordinances*, a reviewing court must determine: (1) whether the ordinance amounts to a total ban (presumptively invalid) or merely a time, place, and manner regulation; (2) if it is a time, place, and manner regulation, the court must decide whether the ordinance is subject to strict or intermediate scrutiny; and (3) if it is subject to intermediate scrutiny, then the court must determine whether it is "designed to serve a substantial government interest" and allows for reasonable alternative channels of communication. *Peek-a-Boo I*, 337 F.3d at 1264 (citing *Renton*, 475 U.S. at 46-50; *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring in the judgment)). But under the *O'Brien-Barnes* test for *public nudity ordinances*, a reviewing court must determine whether: (1) the government acted within the bounds of its constitutional power in enacting the ordinance; (2) the ordinance furthers a "substantial government interest"; (3) "the government interest is unrelated to the suppression of free expression"; and (4) the ordinance restricts First Amendment freedoms no more than is essential to further the government's interest. *O'Brien*, 391 U.S. at 377; *Barnes*, 501 U.S. at 567 (quoting *O'Brien*, 391 U.S. at 376-77). We have concluded that the same standard is used to determine whether an ordinance "is designed to serve" the government's interest (*Renton* step 3) or "furthers" the government's interest (*O'Brien* step 2). *Peek-a-Boo I*, 337 F.3d at 1264-65. On appeal, Peek-a-Boo only disputes whether the County satisfies *Renton* step 3; notably, Peek-a-Boo does not deny that combating negative secondary effects associated with adult entertainment is a substantial government interest. Because Peek-a-Boo only challenges the requirement that is common to both tests, there is no need to analyze the zoning and nudity portions of the ordinance separately.

In determining whether the ordinance meets this standard, the county or municipality first bears the initial burden of producing the evidence that it has relied on to reach the conclusion that the ordinance furthers its interest in reducing secondary effects. *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860, 875 (11th Cir. 2007) (citing *Peek-a-Boo I*, 337 F.3d at 1269). If the governmental entity has produced "evidence that it reasonably believed to be relevant to its rationale for enacting the ordinance," then the burden shifts to the plaintiff to "cast direct doubt on this rationale," either by showing that the evidence does not support its rationale or by producing evidence disputing the local government's factual findings. *Id.* at 875-76 (internal quotation marks omitted). If the plaintiff sustains its burden, the burden shifts back to the government to supplement the record with evidence renewing support for a theory that justifies the ordinance. *Id.* at 876.

On this record, we are satisfied that the County has met its initial burden and that Peek-a-Boo has failed to cast direct doubt. While the County "cannot rely on shoddy data or reasoning," *Peek-a-Boo I*, 337 F.3d at 1269, it is not required to "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the [County] relie[d] upon is reasonably believed to be relevant to the problem that the [County] addresses," *Renton*, 475 U.S. at 51-52. Nor was the County required to produce empirical evidence or scientific studies as long as it "advance[d] some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity

and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring in the judgment). Here, the County relied on a vast legislative record that included judicial opinions, reports and studies that had been prepared for other municipalities, testimony from expert witnesses, affidavits from a private investigator who visited sexually oriented businesses in Manatee County, and newspaper articles. It is undeniable that the County has made a substantial showing, relying on as thorough a record as we have seen in these cases, and far more than the "very little evidence" required under *Alameda Books*. 535 U.S. at 451 (Kennedy, J., concurring in the judgment). Moreover, Peek-a-Boo has failed to cast direct doubt on the totality of the County's evidence.

A. The County's Initial Burden

To begin with, Manatee County has produced a substantial body of evidence, which it reasonably believed to be relevant to combating negative secondary effects. The County explained that its rationale was to reduce a variety of negative secondary effects associated with sexually oriented businesses:

> Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, public safety risks, prostitution, potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal

restrictions similar to those found in Ordinance 05-21, and many of them accepted legislative findings concerning the negative secondary effects of adult businesses. *See, e.g.*, *Barnes*, 501 U.S. at 572 (upholding requirement that dancers in adult establishments wear pasties and a G-string); *California v. LaRue*, 409 U.S. 109, 118-19 (1972) (upholding prohibitions on nude dancing in establishments that serve alcohol); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1365-66 (11th Cir. 1999) (upholding a requirement that adult establishments have an area of at least 1,000 square feet). Indeed, the Supreme Court has suggested in *Pap's A.M.* that a municipality may meet its initial burden solely by relying on relevant Supreme Court cases. 529 U.S. at 296-97.

Here, however, the County has also relied on twenty studies (many of which were empirical) conducted in other cities, again examining the nexus between sexually oriented businesses and negative secondary effects.[10]

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670 F.2d 943 (11th Cir. 1982); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 973 F. Supp. 1428 (M.D. Fla. 1997); and *Bd. of Cnty. Comm'rs v Dexterhouse*, 348 So.2d 916 (Fla. Dist. Ct. App. 1977).

10. These studies were conducted in Phoenix, Arizona 1979; Minneapolis, Minnesota 1980; Houston, Texas 1997; Indianapolis, Indiana 1984; Amarillo, Texas 1977; Garden Grove, California 1991; Los Angeles, California 1977; Whittier, California 1978; Austin, Texas 1986; Seattle, Washington 1989; Oklahoma City, Oklahoma 1986; Dallas, Texas 1997; Newport News, Virginia 1996; New York, New York 1994; Phoenix, Arizona 1995-1998; Centralia, Washington 2004; Greensboro, North Carolina 2003; Houston, Texas 1983; Louisville, Kentucky 2004; and the State of Minnesota 1989.

Appendix A

The studies found, among other things: a higher incidence of arrests for sex offenses in neighborhoods surrounding sexually oriented businesses as compared with control areas (Phoenix, Arizona 1979); a higher incidence of sex-related crimes near sexually oriented businesses as compared with control areas (Indianapolis, Indiana 1984; Austin, Texas 1986); a real association between sexually oriented businesses and elevated crime levels (Minneapolis, Minnesota 1980; Indianapolis, Indiana; Amarillo, Texas 1977; Whittier, California 1978; Seattle, Washington 1989); a correlation between sexually oriented businesses and lower property values (Seattle, Washington); survey data from real estate appraisers who opined that sexually oriented businesses would have a negative effect on property values (Los Angeles, California 1977; Oklahoma City, Oklahoma 1986; Dallas, Texas 1997); and testimony from citizens who were afraid to walk the streets in areas with a high concentration of sexually oriented businesses (Los Angeles, California).

The County also referenced findings that dancers at sexually oriented businesses experience physical and sexual abuse, drawn from a paper entitled "Stripclubs According to Strippers: Exposing Workplace Sexual Violence" by Kelly Holsopple, the Program Director of the Freedom and Justice Center for Prostitution Resources in Minneapolis, Minnesota; the affidavits of Tom McCarren, detailing illegal activity taking place inside sexually oriented businesses in Manatee County, including illegal touching in private rooms; an affidavit from Detectives Evelio Perez and Dave Ackerson of the Manatee County Sheriff's Office, who conducted an undercover operation

at Cleopatra's revealing several liquor violations, including serving alcohol after hours, dealing in stolen property, and vending goods with a counterfeit trademark; and newspaper articles about stings conducted in North Miami Beach and Pasco County, which detailed a variety of illegal acts taking place in sexually oriented businesses. This ample foundation is more than enough to sustain the County's initial burden under the second prong of the *O'Brien* test and the third prong of the *Renton* test.

B. Peek-a-Boo's Burden to Cast Direct Doubt

Since the County has produced evidence that it reasonably believed to be relevant to its rationale, the burden shifts to Peek-a-Boo to cast direct doubt on the County's rationale, either by showing that the County's evidence does not actually support its rationale or by producing evidence disputing the County's factual findings. *Daytona Grand*, 490 F.3d at 875. Peek-a-Boo has not met this burden.

In the first place, Peek-a-Boo argues that it was "extremely problematic" to use judicial opinions as evidence because of "the unreliability of judicial decisions as proof of facts," citing to *Lawrence v. Texas*, 539 U.S. 558, 570 (2003), as well as a Fifth Circuit decision, *H & A Land Corp. v. City of Kennedale*, 480 F.3d 336 (5th Cir. 2007), which Peek-a-Boo claims misstated a fact regarding a study it had cited. But the suggestion that the County may not reasonably rely on judicial opinions as evidence has been squarely rejected by this Court in *Peek-a-Boo I*, where we held that "any evidence . . . including a

municipality's own findings, evidence gathered by other localities, *or* evidence described in a judicial opinion -may form an adequate predicate to the adoption of a secondary effects ordinance." 337 F.3d at 1268 (emphasis added).

Second, Peek-a-Boo faults the County for omitting pages from two of the documents it submitted. However, Peek-a-Boo has raised this argument only for the first time on appeal. We generally do not consider arguments raised for the first time on appeal, and we decline to do so here. *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1215 n.8 (11th Cir. 2010).

Third, Peek-a-Boo claims that four of the studies prepared for other cities -those conducted in Indianapolis in 1984, Austin in 1986, Oklahoma City in 1986, and Los Angeles in 1977 --contained opinion surveys and were "problematic, if not inadmissible before the Courts." Peek-a-Boo does not explain this, however, only citing to a 1978 Third Circuit opinion, *Pittsburgh Press Club v United States*, 579 F.2d 751, 759 (3d Cir. 1978), and a 1963 opinion from the Southern District of New York, *Zippo Manufacturing Co. v. Rogers Imports, Inc.*, 216 F. Supp. 670, 681-82, 684 (S.D.N.Y. 1963). We remain unpersuaded. There is no precedent that bars a county from relying on studies that are not empirical in nature. *See Daytona Grand*, 490 F.3d at 881 ("[Plaintiff's argument] essentially asks this Court to hold today that the City's reliance on anything but empirical studies based on scientific methods is unreasonable. This was not the law before *Alameda Books*, and it is not the law now.") What's more, the cases Peek-a-Boo cites are inapposite because they address the

admissibility in court of opinion polls under the hearsay rule. *See Pittsburgh Press Club*, 579 F.2d at 759-60; *Zippo Mfg. Co.*, 216 F. Supp. at 681-84. In this case, the question is whether the County reasonably believed the evidence to be relevant to its rationale in adopting the ordinance. *Cf. Peek-a-Boo I*, 337 F.3d at 1268.

The heart of Peek-a-Boo's attack is found in the affidavits proffered by its experts Dr. Fisher, Dr. Danner, and Mr. Schauseil. Dr. Fisher's affidavit claimed that the foreign studies on which the County relied are defective. Dr. Fisher, however, only challenged the findings of seventeen of the foreign studies. Neither Dr. Fisher nor any of the Plaintiff's experts say anything about three foreign studies --namely, Houston, Texas 1983; the State of Minnesota 1989; and Louisville, Kentucky 2004. The 1983 Houston report details the findings the Houston City Council reached after a total of eight public hearings. The City Council found that sexually oriented businesses were associated with negative secondary effects such as a detrimental effect on property value and quality of life, increased prostitution in at least one area, intrusive signage, and ancillary criminal activity. The State of Minnesota report includes the findings of an empirical study conducted in St. Paul in 1978 of sexually oriented businesses and businesses serving alcohol. The study found a statistically significant correlation between the location of these types of businesses and neighborhood deterioration, as well as an association with higher crime rates and reduced housing values. Minnesota's working group on sexually oriented businesses also heard testimony that neighborhoods with a concentration of

sexually oriented businesses suffered adverse effects such as finding pornographic materials and condoms in the streets, sex acts with prostitutes occurring in plain view of families and children, and harassment of neighborhood residents, including the propositioning of young girls and women on their way to school and work. Finally, the study from Louisville included police reports about prostitution and the promotion of prostitution, and the possession of methamphetamines, marijuana, and unknown white pills at or about adult entertainment establishments.

Beyond failing to challenge these studies at all, neither Dr. Fisher nor the Plaintiff's other experts has directly addressed the twenty-five judicial opinions relied upon by the County. Nor do the Plaintiff's experts attempt to cast any direct doubt on the affidavits submitted by the private investigator and two police officers detailing illegal activities found in the County's sexually oriented businesses, or comment at all about the report detailing sexual violence against dancers in sexually oriented businesses. Finally, the Plaintiff's experts have not addressed the newspaper articles regarding stings at Florida strip clubs. In short, a substantial body of evidence remains wholly unaddressed by the Plaintiff.

Moreover, Dr. Fisher's criticism of seventeen studies neither invalidates them nor renders the County's reliance on them unreasonable. Dr. Fisher criticizes some of the studies (Phoenix, Whittier, Austin, and Dallas) for not matching the control area closely enough to the study area in demographic terms. This does not undermine the County's ability to rely on them, inasmuch as we have

rejected the argument that a municipality may only rely on studies employing the scientific method. *See Daytona Grand*, 490 F.3d at 881. For this reason, we are also unpersuaded by Dr. Fisher's criticism that some of the studies have small sample sizes (Indianapolis; Oklahoma City), only measure data over the course of one or two years (Phoenix; Austin), or lack empirical data (Houston 1997; Amarillo; Seattle). *See id.*[11]

Dr. Fisher also pointed out that a few of the studies offer some findings that are inconclusive. Again, we are unpersuaded because these studies still draw other findings that are conclusive. We repeat that "[a]lthough the burden lies with the municipality, a court should be careful not to substitute its own judgment for that of the municipality" and should remember that "the municipality's legislative judgment should be upheld provided that it can show that its judgment is still supported by credible evidence, upon which it reasonably relies." *Daytona Grand*, 490 F.3d at 876 (internal quotation marks omitted). At best, Dr. Fisher has pointed to *some* problems with *some* of the studies, but on this ample record this is not enough to carry the day.

Dr. Danner's affidavit, also filed on behalf of Peek-a-Boo, attempts to cast direct doubt on the County's case by undermining the County's rationale for adopting the ordinance, which, among other things, is that sexually

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11. Indeed, in Dr. McCleary's opinion, none of these criticisms is sufficient to wholly invalidate any of the studies, and taken together, they constitute "a very, very compelling literature that shows a consistent consensus finding; sexually oriented businesses pose crime-related secondary effects."

oriented businesses cause increases in crime rates. Dr. Danner examined crime rates in the County based on crimes known to police in the following offense categories: rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft. He also tracked calls for police service, comparing two sexually oriented businesses with twelve non-adult businesses in the same area. Dr. Danner opined that the evidence was insufficient to conclude that the two adult establishments caused crime-related secondary effects "beyond what would be normally expected" for non-adult alcohol-serving establishments.

Dr. Danner's affidavit, however, did not address the County's findings regarding the correlation between sexually oriented businesses and other crimes, such as prostitution, lewdness, public indecency, illicit sexual activity, illicit drug use, and drug trafficking. What's more, there are serious methodological problems with Dr. Danner's findings. This Court has found that wholesale reliance on data based on crimes that are reported to the police may lead to an underestimation of the total number of crimes, since certain crimes, such as lewdness and prostitution, are rarely reported. *See Daytona Grand*, 490 F.3d at 882-83. Likewise, there are methodological problems with estimating crime rates simply based on calls for police services: Dr. McCleary opined that there are far more calls than there are actual incidents of crimes, and most crimes do not in fact come to the attention of the police through calls from victims or witnesses.

There are also problems with Richard Schauseil's affidavit, which avers that the County's sexually oriented

businesses do not negatively affect commercial property value. First, Mr. Schauseil measured the assessed value of properties, and the County's expert Shawn Wilson cautioned that assessed values are far less accurate than appraisal values. Second, Ms. Wilson observed that Mr. Schauseil's study drew a comparison of listing prices, which may not be closely related to market value at all. Third, Mr. Schauseil's study analyzed the difference between sale and resale value, which may be explained by generally rising neighborhood property values or improvements to the property itself. Without knowing what improvements took place, it would not be proper to assume that a higher resale value meant that property values in the neighborhood were rising.

The bottom line is that the County has presented a substantial body of evidence to support its rationale for adopting the ordinance. Peek-a-Boo has failed even to address much of that evidence at all, and it has failed to show that the County's rationale or this body of evidence was unreasonable.

III.

Peek-a-Boo also claims that in deciding *Daytona Grand* and *Flanigan's Enterprises, Inc. of Georgia v. Fulton County*, 596 F.3d 1265 (11th Cir. 2010) ("*Flanigan's II*"), this Court impermissibly overruled *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985), *Flanigan's Enterprises, Inc. of Georgia v. Fulton County*, 242 F.3d 976 (11th Cir. 2001) ("*Flanigan's I*"), and *Peek-a-Boo I*. We are bound to follow our precedent, and we have done so in

Daytona Grand and *Flanigan's II*. Cases involving the regulation of sexually oriented businesses are of necessity fact-specific, and the answer in each one is largely driven by the nature of the record.

Thus, for example, in *Krueger*, we found that a Pensacola ordinance banning topless dancing was unconstitutional because the city produced no evidence that crime was a problem at topless bars in the city. 759 F.2d at 854-55. In *Flanigan's I*, we found it unreasonable for the county to rely on foreign studies concerning secondary effects when the county had conducted its own empirical studies that conclusively undermined its reliance on the foreign studies' findings. 242 F.3d at 986. In contrast, in *Daytona Grand*, the city of Daytona Beach relied on a significant record of evidence in adopting its ordinance. This record included police reports of criminal activity in and around adult theaters; undercover reports finding violations of city ordinances; specific documentation from the police chief of criminal activity in and around the theaters; data from police dispatchers regarding police calls; expert testimony; studies conducted for other cities that found that adult businesses tend to increase urban blight; studies of urban blight in Daytona Beach itself; controlled laboratory studies of the connection between alcohol and sexual conduct; anecdotal accounts from local business owners of increased crime; and newspaper articles. 490 F.3d at 882.

Similarly, in *Flanigan's II*, Fulton County relied on the findings of a 337page report describing a fourteen-day sting operation of strip clubs in the county that resulted

in 167 arrests and 166 convictions. 596 F.3d at 1280. The report also included affidavits regarding the impact of the strip clubs on young people in the county; affidavits regarding the clubs' non-criminal negative secondary effects, such as urban blight; and foreign studies. *Id.* The facts addressed in *Daytona Grand* and *Flanigan's II* were significantly different than those found in *Krueger* and *Flanigan's I*, so not surprisingly, the outcomes in these cases were different, although the legal principles were the same.[12]

The County has produced a very substantial body of evidence, which it reasonably believed was relevant to its rationale for enacting the ordinance, and Peek-a-Boo has failed to cast direct doubt on this rationale.

Accordingly, the district court's grant of summary judgment in favor of the County is **AFFIRMED.**

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12. Peek-a-Boo is also wrong in suggesting that the tool of summary judgment is always inappropriate when analyzing ordinances that attempt to regulate adult dancing establishments. We rejected summary judgment in *Peek-a-Boo I* because the plaintiffs had met their burden of casting direct doubt on the evidence the County had presented in support of its public nudity ordinance. 337 F.3d at 1271-72.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION, FILED NOVEMBER 25, 2009

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:05-CV-1707-T-27TBM

PEEK-A-BOO LOUNGE OF
BRADENTON, INC., et al.,

Plaintiffs,

vs.

MANATEE COUNTY, FLORIDA,

Defendant.

ORDER

BEFORE THE COURT is Manatee County's notice (Dkt. 65) of renewing Defendant's motion for summary judgment (Dkt. 31) and motion to strike affidavits (Dkt. 47). Plaintiffs responded in opposition to the motion for summary judgment (Dkt. 44) and motion to strike (Dkt. 51). Defendant filed a supplemental brief in support of the renewed motion for summary judgment (Dkt. 66). For the reasons that follow, Defendant's motion for summary judgment (Dkt. 31) is **GRANTED** and Plaintiffs' motion to strike (Dkt. 47) is **DENIED** as moot.

Appendix B

Background

Plaintiffs are three adult dancing establishments which challenge the constitutionality of certain 2005 amendments to Manatee County's Adult Entertainment Code on facial and as-applied grounds. Two of the Plaintiffs brought an earlier action which involved different ordinances. A summary of the prior action is appropriate to set the stage for Plaintiffs' latest challenge.

In the late 1990s, the County amended its Adult Entertainment Code, enacting Ordinance 9846, which established certain physical requirements for premises used for adult dancing. A few months later, the County adopted a generally-applicable public nudity ordinance, 99-18. That ordinance prohibited anyone, including exotic dancers, from appearing in public in "G-strings, T-backs, dental floss, and thongs."

Peek-A-Boo Lounge of Bradenton, Inc. and M.S. Entertainment, Inc. d/b/a Temptations II commenced an action challenging the constitutionality of Ordinances 98-46 and 99-18. This Court, finding the ordinances constitutional, granted summary judgment in favor of the County. The Eleventh Circuit reversed, holding that the adult dancing establishments had submitted sufficient evidence to cast direct doubt on the County's rationale for adopting the general public nudity ordinance. Accordingly, the Circuit Court remanded for a determination of whether, in light of Plaintiffs' evidence, "there remains credible evidence upon which the County could reasonably rely in concluding that the ordinance would combat the

considered the findings, interpretations, and constructions of twenty-five judicial opinions. (Dkt. 32-14 – Dkt. 34-7). *See* Manatee County, Fla. Code of Ordinances § 2-2.5-1(b). The Board reviewed and considered seventeen secondary-effects reports, reports on physical abuse of exotic dancers, affidavits from a private investigator, and various other reports and materials. (Dkt. 32-10 – Dkt. 32-13; Dkt. 34-8 – Dkt. 3716). *See* § 2-2.5-1(b). The Board held a four-hour public hearing, during which expert witnesses testified in support of and against the proposed ordinance. (Dkt. 31-4). In support of the ordinance, Richard McCleary, Ph.D., a criminologist and university professor, and Shawn Wilson, a real estate appraiser, testified about several adverse secondary effects associated with sexually oriented businesses. (Dkt. 31-4). Plaintiffs opposed the adoption of Ordinance 05-21. They presented the testimony of Randy D. Fisher, Ph.D., an associate professor of Psychology and Director of the Survey Research Laboratory at the University of Central Florida, Terry A. Danner, Ph.D., Chair of the Department of Criminology at Saint Leo University, Judith Lynne Hanna, Ph.D., an anthropologist and dance scholar, and Richard Schauseil, a licensed real estate agent. (Dkt. 31-4).

After considering all of the evidence and testimony, the Board found:

> Sexually oriented businesses, as a category of commercial uses, are associated with a wide variety of adverse secondary effects including, but not limited to, personal and property crimes, public safety risks, prostitution,

> potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, negative impacts on surrounding properties, litter, and sexual assault and exploitation.

§ 2-2.5-1(b)(1). The Board found that the County had a substantial government interest in preventing and abating each of these negative secondary effects and that the County's interest extended beyond currently existing secondary effects to include effects that could occur in the future. § 2-2.5-1(b)(2). Accordingly, the Board adopted Ordinance 05-21 "to regulate sexually oriented businesses in order to promote the health, safety, and general welfare of the citizens of the County, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the County." § 2-2.5-1(a).

In substance, Ordinance 05-21 establishes a licensing scheme for sexually oriented businesses, sets forth physical requirements for certain business premises, and restricts hours of operation. §§ 22.5-4 - 2.2.5-18. The ordinance prohibits the sale, use, or consumption of alcohol on the premises of sexually oriented businesses. § 2-2.5-18(d). Ordinance 05-21 contains specific nudity restrictions for sexually oriented businesses. In particular, all persons are prohibited from appearing in sexually oriented businesses in a "state of nudity" which is defined as "the showing of the human male or female genitals, pubic area, vulva, or

anus with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any part of the nipple and areola." §§ 2-2.52, 2-2.5-18(a). Employees of sexually oriented businesses may appear "semi-nude" which is "a condition in which a person is not nude, but is showing a majority of the female breast below a horizontal line across the top of the areola and extending across the width of the breast at that point, or is showing the majority of the male or female buttocks."[2] §§ 2-2.5-2, 2-2.5-18(b). However, those appearing semi-nude must "remain[] at least six (6) feet from any patron or customer and on a stage that is at least eighteen (18) inches from the floor and in a room of at least one thousand (1,000) square feet." § 2-2.5-18(b).

Plaintiffs filed this action to invalidate Ordinance 05-21 on constitutional grounds. Manatee County moved for summary judgment. (Dkt. 31). The County submitted substantial evidence in support of its motion, including five volumes of the legislative record and an additional volume of deposition testimony, affidavits, expert reports, and post-enactment evidence. (Dkt. 31-2 – Dkt. 37-16). Plaintiffs argue that the ordinance is unconstitutional on its face and as applied to them. Specifically, Plaintiffs argue that the County was unreasonable in believing that the evidence in the legislative record was relevant to its rationale for enacting the ordinance. Plaintiffs submitted affidavits from four expert witnesses (Dkt. 45) which they contend cast direct doubt on the County's rationale

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2. It is not disputed that the ordinance permits dancers to perform in pasties and a G-string.

for the ordinance.[3] After the summary judgment motion was fully briefed, Plaintiffs' counsel conceded at a status conference that the Eleventh Circuit's recent opinion in *Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860 (11th Cir. 2007) "really essentially does away with the as applied argument." (Dkt. 66-2, Status Conf. Tr. 6:8-10 (Jan. 15, 2008)).

Standard

The summary judgment standards set forth in Rule 56 of the Federal Rules of Civil Procedure and articulated in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) apply to constitutional challenges to the validity of an ordinance. *See Peek-A-Boo*, 337 F.3d at 1272. Under those standards, summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 322; Fed. R. Civ. P. 56. "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp.*

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3. The County moved to strike the affidavits on the ground that they contain legal argument and previously undisclosed expert opinions. (Dkt. 47). The County's objection to the inclusion of legal argument in the affidavits is well-taken. *Cf. Cook ex rel. Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1111 (11th Cir. 2005) (expert testimony inappropriate to offer "nothing more than what lawyers for the parties can argue in closing arguments"). The Court has considered the affidavits, with the exception of portions containing legal argument. The affidavits fail to create a genuine issue of material fact.

v. N. Crossarm Co., 357 F.3d 1256, 1259 (11th Cir. 2004). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." *Id.* at 1260. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.* Once a party properly makes a summary judgment motion by demonstrating the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings through the use of affidavits, depositions, answers to interrogatories and admissions on file, and designate specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 323-24. The Court will not weigh the evidence or make findings of fact. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 (11th Cir. 2003). "The court's role is limited to deciding whether there is sufficient evidence upon which a reasonable juror could find for the non-moving party." *Id.*

Analysis

Nude dancing constitutes expressive conduct, although "it falls only within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion).[4] Accordingly,

4. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (quotation marks omitted). The plurality's opinion is the holding of the Supreme Court in *City of Erie v. Pap's A.M. Peek-A-Boo*, 337 F.3d at 1261.

ordinances targeting the secondary effects of sexually oriented businesses will be upheld if they comply with certain constitutional standards. *See Peek-A-Boo*, 337 F.3d at 1264. The standard to be applied depends on the type of ordinance. *See id.*

Zoning ordinances which regulate "the conditions under which adult entertainment businesses may operate should be evaluated under the standards for time, place, and manner regulations" set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). *Id.* The *Renton* test involves three parts:

> first, the court must determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.

Id.

In contrast, content-neutral public nudity ordinances should be evaluated under the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* Under the *O'Brien* test, "public nudity ordinances that incidentally

impact protected expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest." *Id.*

Plaintiffs do not argue that the portions of Ordinance 05-21 which are subject to the *Renton* test constitute a total ban or fail to allow reasonable alternative channels of communication. Indeed, the ordinance does not ban sexually oriented businesses but rather regulates the manner in which they operate. To the extent Plaintiffs argue that strict scrutiny should apply, they are incorrect. Under *Renton*, an ordinance regulating conduct within adult businesses is content neutral "if it is aimed at reducing the negative secondary effects associated with these establishments." *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1308 (11th Cir. 2003). On its face, Ordinance 05-21 is intended to address negative secondary effects, not speech and is therefore subject to only intermediate scrutiny. *See, e.g., City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment);[5] *Zibtluda, LLC v. Gwinnett County, Ga.*, 411 F.3d 1278, 1285-86 (11th Cir. 2005).

Similarly, Plaintiffs do not argue that the nudity restrictions subject to the *O'Brien* test are outside the County's power to enact, are related to the suppression of

5. Pursuant to *Marks v. United States*, Justice Kennedy's concurring opinion is the holding of the Supreme Court in *City of Los Angeles v. Alameda Books*. *See Peek-A-Boo*, 337 F.3d at 1264.

free expression, or are not narrowly tailored. *See Daytona Grand*, 490 F.3d at 873 (applying *O'Brien* test to three nudity ordinances, one of which specifically governed adult businesses); *but see Fly Fish*, 337 F.3d at 130809 (applying *Renton* test to nudity ordinance specifically governing adult businesses).[6]

Plaintiffs' constitutional challenge focuses solely on the third part of the *Renton* test and the second part of the *O'Brien* test. The two inquiries, whether the ordinance "is designed to serve" a substantial government interest (*Renton*) and whether the ordinance "furthers" a substantial government interest (*O'Brien*), are "virtually indistinguishable." *Daytona Grand*, 490 F.3d at 874 n.20. It has been "clearly established that reducing the secondary effects associated with adult businesses is a substantial government interest that must be accorded high respect." *Id.* at 874 (quotation marks omitted). Whether the ordinance is "designed to serve" or "furthers" that interest requires application of a burden-shifting test.

The County "bears the initial burden of producing evidence that it relied upon to reach the conclusion that the ordinance furthers the [County's] interest in reducing secondary effects." *Id.* at 875. Plaintiffs may then attempt to "cast direct doubt" on the County's rationale for enacting the ordinance. *Id.* If Plaintiffs succeed, "the burden shifts back to the [County] to supplement the

6. Because Plaintiffs challenge the ordinance on one limited ground which is subject to the same analysis under *Renton* and *O'Brien*, the result is the same under either test.

record with evidence renewing support for a theory that justifies its ordinance." *Id.* at 876.

1. Did the County carry its initial burden of producing pre-enactment evidence reasonably believed to be relevant to its rationale for enacting Ordinance 05-21?

There must be pre-enactment evidence which the County reasonably believed was relevant to combating negative secondary effects associated with sexually oriented businesses. *Id.* The County is not required to "conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the [County] relies upon is reasonably believed to be relevant to the problem that the [County] addresses." *Id.* at 875 (quoting *Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring)). Likewise, the County is not required to obtain or rely upon evidence specific to each type of business to be regulated. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (1991) (Souter, J., concurring in the judgment) (findings of secondary effects in adult theaters appropriately extended to nude dancing establishments).[7] Although "shoddy data or reasoning" are insufficient, the County is not restricted to empirical evidence or scientific studies. *See Daytona Grand*, 490 F.3d at 881. The County need only "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity

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7. Pursuant to *Marks v. United States*, Justice Souter's concurring opinion is the holding of the Supreme Court in *Barnes v. Glen Theatre*. *See Peek-A-Boo*, 337 F.3d at 1260.

and accessibility of speech substantially intact." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring). The ordinance must meet the evidentiary threshold described in *Renton* and *Alameda Books*, be "narrowly tailored" to serve the government interest, and allow for reasonable alternative avenues of expression. *Peek-A-Boo*, 337 F.3d at 1266.

The vast legislative record in the instant case contains prior judicial opinions, reports and studies prepared for other municipalities, research and testimony of expert witnesses, newspaper articles, and affidavits from a private investigator who visited sexually oriented businesses in Manatee County, including Plaintiffs' businesses. (Dkt. 32-2 – Dkt. 37-16). The County appropriately relied on these forms of evidence, as well as common sense and the local knowledge of the Board members. *See Daytona Grand*, 490 F.3d at 875, 881. The Board's finding that sexually oriented businesses are associated with "personal and property crimes, public safety risks, prostitution, potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, negative impacts on surrounding properties, litter, and sexual assault and exploitation" is well-supported in the extensive legislative record. Manatee County, Fla. Code of Ordinances § 2-2.5-1(b)(1). The County submitted significantly more than the "very little evidence" required and has therefore carried its initial burden. *See Alameda Books*, 535 U.S. at 451 (Kennedy, J., concurring).

2. Did Plaintiffs cast direct doubt on the County's rationale for Ordinance 05-21?

"The municipality's evidence must fairly support the *municipality's* rationale for its ordinance. If plaintiffs fail to cast direct doubt on *this* rationale, either by demonstrating that the municipality's evidence does not support *its* rationale or by furnishing evidence that disputes the *municipality's* factual findings, the municipality meets the standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39 (plurality opinion) (emphasis added); *id.* at 439 (explaining that "actual and convincing evidence" is necessary); *Peek-A-Boo*, 337 F.3d at 1269. To satisfy their burden, Plaintiffs must "cast direct doubt on *all* of the evidence that the [County] reasonablyrelied on when enacting the challenged ordinance[]." *Daytona Grand*, 490 F.3d at 884 (emphasis added); *see also Alameda Books*, 535 U.S. at 435-36 (plurality opinion) (upholding city's ordinance based on evidence of crime even though evidence of diminished property values was inconclusive). Plaintiffs rely on several affidavits in an effort to impugn the County's rationale.

To address the County's finding of a correlation between sexually oriented businesses and crime, Plaintiffs rely on the affidavits of Drs. Fisherand Danner. Dr. Fisher critiqued several empirical studies in the legislative record. (Dkt. 45-3). Plaintiffs contend that Dr. Fisher's affidavit demonstrates that the County was not reasonable in relying on these studies. Dr. Fisher did not, however, address any other forms of evidence on which the County reasonably relied

Dr. Danner examined crime rates in Manatee County. He averred that there was "very insufficient evidence" that two of Plaintiffs' sexually oriented businesses were "uniquely criminogenic environments such that they [we]re generating crime related secondary effects in their areas of location in a way that would be beyond what would be expected from an average bar or nightclub." (Dkt. 31-12 at 18). In reaching this conclusion, Dr. Danner studied incidents of rape, robbery, aggravated assault, burglary, larceny, and motor vehicle theft which were known to Manatee County police. (Dkt. 31-12 at 3). However, Dr. Danner's study of "crimes known to police" did not purport to address the County's finding of a correlation between sexually oriented businesses and other crimes, such as prostitution, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking. Although Dr. Danner also examined "calls for police service" at Plaintiffs' businesses, the Eleventh Circuit has discounted the value of this evidence in casting doubt on findings of these secondary effects which often do not result in calls for police service. *See Daytona Grand*, 490 F.3d at 882-83.

Plaintiffs submitted affidavits from two additional expert witnesses, Mr. Schauseil and Dr. Hanna. However, Plaintiffs' brief does not cite, reference, rely upon or contain any argument related to either affidavit. Schauseil averred that Plaintiffs' businesses do not negatively impact property values or building permit applications in the surrounding commercial area. (Dkt. 45-6 at 3-5). Dr. Hanna provided an extensive history of exotic dance as art. (Dkt. 45-4). She offered the opinion that the ordinance's restrictions on nudity, proximity, and touching of patrons would suppress the expressive message of the

dance performance.[8] (Dkt. 45-4 at 62). Dr. Hanna also questioned the reliability of two secondary effects reports from insiders of sexually oriented businesses.

Relying on their experts' opinions, Plaintiffs argue that sexually oriented businesses have no greater correlation with secondary effects than other types of businesses. However, the County expressly stated that its rationale for the ordinance existed "independent of any comparative analysis between sexually oriented and non-sexuallyoriented businesses." § 2-2.5-1(b)(2). Evidencethat other businesses also experience secondary effects does little to cast doubt on the secondary effects associated with sexually oriented businesses. Nor does it render regulation of Plaintiffs' businesses arbitrary, discriminatory, or unreasonable. The County may regulate secondary effects in sexually oriented businesses, including Plaintiffs', notwithstanding the existence of secondary effects in other types of businesses. *See Renton*, 475 U.S. at 52-53.

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8. Plaintiffs do not argue that the ordinance suppresses the dancer's expressive message. The County argues, and Plaintiffs do not dispute, that similar ordinances have been upheld as constitutional. *See, e.g., Pap's A.M*, 529 U.S. at 301 (plurality opinion) (upholding requirement of pasties and G-string); *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1363-65 (11th Cir. 1999) (upholding hours limitations and 1000 ft. room requirement); *Artistic Entm't, Inc. v City of Warner Robbins*, 331 F.3d 1196, 1199 (11th Cir. 2003) (alcohol ban previously upheld); *Fantasy Ranch Inc. v. City of Arlington*, 459 F.3d 546, 562-63 (5th Cir. 2006) (upholding requirement for performers to remain six feet away from patrons); *City of Littleton v. Z.J Gifts D-4, L.L.C.*, 541 U.S. 774, 783 (2004) (licensing requirements upheld as constitutional).

on studies of other types of sexually oriented businesses in concluding that similar secondary effects are correlated with establishments such as the Plaintiffs'. *See Barnes*, 501 U.S. at 584 (Souter, J., concurring) ("The type of entertainment respondents seek to provide is plainly of the same character as that at issue in *Renton*, *American Mini Theatres*, and *LaRue*. It therefore is no leap to say that live nude dancing of the sort at issue here is likely to produce the same pernicious secondary effects as the adult films displaying 'specified anatomical areas' at issue in *Renton*."). Plaintiffs have not demonstrated that the County's reliance on evidence related to businesses other than adult dancing establishments was unreasonable or that this evidence is inapplicable to adult dancing establishments.

Plaintiffs have failed to cast direct doubt on the County's rationale for enacting Ordinance 05-21. Plaintiffs did not address all of the evidence supporting the County's finding of a correlation between sexual oriented businesses and prostitution, the potential spread of disease, lewdness, public indecency, illicit sexual activity, illicit drug use and drug trafficking, undesirable and criminal behavior associated with alcohol consumption, and litter. Nor did Plaintiffs furnish evidence sufficient to call into question each of these factual findings. Plaintiffs have therefore failed to satisfy their burden of casting direct doubt on the County's rationale for the ordinance.

The Circuit Court's concern in the prior *Peek-A-Boo* action, that the County relied on "speculative findings and outdated, foreign studies whose relevance to local

conditions appears questionable in light of current data," is not implicated here. *Peek-A-Boo*, 337 F.3d at 1272. In that case, the adult businesses cast direct doubt on the County's rationale by submitting recent local evidence suggesting that their businesses did not cause the secondary effects the County sought to address. Here, despite arguing that the ordinance is unconstitutional "as applied" to them, Plaintiffs have not submitted any evidence, local or otherwise, to suggest that there is no correlation between their businesses and each of the secondary effects the County sought to address.[10] In the absence of such evidence, Plaintiffs have failed to cast direct doubt on the County's rationale, notwithstanding that some of the County's evidence appeared in older foreign studies or was contained in judicial findings in cases from other jurisdictions. *See, e.g., Daytona Grand*, 490 F.3d at 875 (city need not "conduct new studies or produce evidence independent of that already generated by other cities"). Moreover, as noted, Plaintiffs conceded after filing their opposition that their "as applied" challenge is foreclosed by *Daytona Grand*.

Significantly, the information contained in Plaintiffs' affidavits already appears in the legislative record. Prior to the enactment of Ordinance 05-21, Plaintiffs' experts supplied the Board with opinions and studies suggesting that sexually oriented businesses do not cause secondary effects. The County's experts provided contrary opinions and reports indicating that sexually oriented businesses

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10. The County submitted affidavits describing several secondary effects in Plaintiffs' businesses.

do cause secondary effects. The experts on both sides critiqued the opposing studies and opinions. Dr. Richard McClearyprovided the Board with theopinion that Dr. Fisher's methodological criticisms of the empirical studies in the legislative record were "small," did not "bias the study in favor of an adverse secondary effect finding," and were not sufficient "to categorically invalidate any study's finding." (Dkt. 32-11 at 11-12). Dr. McCleary also noted that Dr. Danner's study of crime rates in Manatee County contained "fundamental violations of statistical assumptions." (Dkt. 32-11 at 12-14). Shawn Wilson, a licensed real estate appraiser, provided the Board with the opinion that Schauseil did not compare the property values in the areas surrounding Plaintiffs' businesses with sufficiently similar commercial areas. (Dkt. 32-12 at 1). Wilson also opined that Schauseil's methodology was "problematic." (Dkt. 32-12 at 1). Unlike the prior *Peek-A-Boo* action, this is a case involving "a battle of competing experts." *Peek-A-Boo*, 337 F.3d at 1272.

At most, the studies and affidavits on which Plaintiffs rely suggest that the County could have reasonably reached a different conclusion. However, Plaintiffs' evidence does not cast direct doubt on the County's rationale for the ordinance, even at the summary judgment stage. *See Daytona Grand*, 490 F.3d at 881-82. The inquiry is whether *the County's* rationale for the ordinance was reasonable, not whether the County was presented with conflicting evidence which could also support a different reasonable conclusion. *See id.*; *5634 East Hillsborough Ave., Inc. v. Hillsborough County, Fla.*, 294 F. App'x 435, 437 (11th Cir. 2008). The Eleventh Circuit has

clearly instructed that this Court cannot substitute its judgment for the County's, even if Plaintiffs were to have succeeded in demonstrating that another conclusion was also reasonable. *See Daytona Grand*, 490 F.3d at 881-82. Plaintiffs' affidavits are therefore insufficient to demonstrate a genuine issue of material fact. Plaintiffs have not cast direct doubt on the County's rationale for enacting Ordinance 05-21.

In summary, the County was presented with conflicting expert opinions concerning the accuracy and applicability of the studies and reports in the legislative record. After considering all of the evidence and testimony, the County resolved these conflicts and determined there was a relationship between sexually oriented businesses and adverse secondary effects. The record contains no basis to reverse that determination. The County's rationale for the ordinance was reasonable.[11]

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11. This case was stayed during the pendency of an appeal in *5634 East Hillsborough Ave., Inc. v. Hillsborough County, Fla.*, which Plaintiffs described as "an almost identical legislative challenge." (Dkt. 57, ¶ 4). The legislative records were "very similar." (Dkt. 66-2, Status Conf. Tr. 9:25-10:6 (Jan. 15, 2008)). Both cases involved the same expert witnesses. *See 5634 East Hillsborough Ave., Inc. v. Hillsborough County, Fla.*, No. 8:06-cv-1695-T-26EAJ, 2007 WL 2936211 (M.D. Fla. Oct. 4, 2007). Plaintiffs conceded that "the legal issues are virtually identical" and the Eleventh Circuit's decision would "be pretty decisive on most if not all of the arguments that we raise." (Dkt. 66-2, Status Conf. Tr. 5:5-19 (Jan. 15, 2008)). The Circuit Court upheld the ordinance as constitutional: "[W]e conclude that the County met its evidentiary burden to show that its ordinances have the purpose and effect of suppressing secondary effects. We conclude

3. Did the County supplement the record with evidence renewing support for Ordinance 05-21?

Perhaps anticipating that Plaintiffs could conceivably carry their burden, the County came forward with post-enactment evidence of secondary effects which renewed support for its ordinance. *See Daytona Grand*, 490 F.3d at 885 n.35 (post-enactment evidence may be considered in determining renewed support for the ordinance). The County filed affidavits from a private investigator which described incidents of lewdness, illicit sexual activity, and an offer of prostitution occurring in Plaintiffs' businesses.[12] (Dkt. 31-5). The County also filed an affidavit and application for search warrant signed by two detectives of the Manatee County Sheriff's Office. The affidavit described numerous incidents of criminal activity at one of Plaintiff's establishments. (Dkt. 31-6). Notwithstanding Plaintiffs' argument that their businesses do not cause or experience secondary effects, Plaintiffs have not offered any rebuttal to the County's post-enactment evidence. This evidence drawn from Plaintiffs' businesses relates directly to specific secondary effects the County sought to prevent and therefore renews support for Ordinance 05-21.

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that appellants have pointed to no evidence that would create a genuine issue of fact as to whether the County was reasonable in relying on their evidence and their rationale that the ordinances would reduce secondary effects." *5634 East Hillsborough Ave., Inc.*, 294 F. App'x at 437.

12. One of the businesses the investigator visited was "Pandora's Box." He averred that this establishment was formerly known as "Cleopatra's." It is unclear whether this business is still operated by one of the Plaintiffs.

4. Plaintiffs' remaining challenges

Plaintiffs allege in their complaint that the ordinance is unconstitutional on several additional grounds. Defendant's summary judgment motion challenged these remaining grounds. However, Plaintiffs failed to respond to Defendant's challenges to their claims of unconstitutional vagueness or overbreadth. Similarly, notwithstanding their allegations that Ordinance 05-21's licensing provisions lacked procedural safeguards or delegated legislative or judicial authority to administrative employees, Plaintiffs failed to respond to Defendant's arguments concerning the constitutionality of the licensing provisions.

The remaining grounds in Plaintiffs' complaint are meritless. Plaintiffs' takings claim fails because the ordinance does not deny Plaintiffs of all economically beneficial or productive uses of their properties. *See Agripost, Inc. v. Miami-Dade County, ex rel. Manager*, 195 F.3d 1225, 1231 (11th Cir. 1999). Plaintiffs' reliance on the Equal Protection Clause adds nothing to their First Amendment challenge. *See Renton*, 475 U.S. at 55 n.4 ("As should be apparent from our preceding discussion, respondents can fare no better under the Equal Protection Clause than under the First Amendment itself."). Moreover, as discussed, the application of the ordinance to Plaintiffs is not arbitrary, discriminatory, or unreasonable. Plaintiffs' assertion that the ordinance was outside the County's police powers fails. *See Peek-A-Boo*, 337 F.3d at 1269. Likewise, the ordinance's prohibition on the sale or consumption of alcohol in sexually oriented

businesses is not unconstitutional. *See, e.g., Daytona Grand*, 490 F.3d at 876, 885-86. Nor does the ordinance infringe upon any right to free association. Ordinance 05-21 does not impact any right to "maintain certain intimate human relationships" or any "right to associate for the purpose of engaging in those activities protected by the First Amendment." *See, e.g., Gary v. City of Warner Robins, Ga.*, 311 F.3d 1334, 1338 (11th Cir. 2002). Because Ordinance 05-21 is constitutional under *Renton* and *O'Brien*, Plaintiff's assertion that the ordinance amounts to a "spectre of repression" must be rejected. Plaintiffs' remaining grounds have already been addressed and are without merit.

Conclusion

Plaintiffs' contention that they have raised sufficient evidence to create a genuine issue of material fact has been carefully considered by the Court consistent with the summary judgment standards articulated in *Celotex Corp. v. Catrett*. Having drawn all reasonable inferences in favor of the non-moving party, the Court finds Plaintiffs' evidence insufficient to "create a genuine issue of fact as to whether the County was reasonable in relying on their evidence and their rationale that the ordinance[] would reduce secondary effects." *5634 East Hillsborough Ave., Inc.*, 294 F. App'x at 437. Plaintiffs have simply submitted evidence which conflicts with some, but not all, of the County's pre-enactment evidence related to some, but not all, of the secondary effects the County sought to prevent. At most, Plaintiffs evidence may suggest that the County could have reached a different

reasonable conclusion. However, Plaintiffs have not cast direct doubt on the County's rationale for enacting Ordinance 05-21 or the aggregate of evidence on which the County reasonably relied in enacting the ordinance. Moreover, the County submitted post-enactment evidence sufficient to renew support for the ordinance. The ordinance therefore "is designed to serve" a substantial government interest pursuant to *Renton* and "furthers" a substantial government interest pursuant to *O'Brien*. In sum, Ordinance 05-21 is constitutional on its face and as applied to Plaintiffs.

Accordingly, it is **ORDERED AND ADJUDGED** that Defendant's motion for summary judgment (Dkt. 31) is **GRANTED**. All pending motions, including Defendant's motion to strike (Dkt. 47), are **DENIED** as moot. The clerk is directed to **CLOSE** this case.

DONE AND ORDERED in chambers this 25th day of November, 2009.

/s/
JAMES D. WHITTEMORE
United States District Judge

Copies to:
Counsel of Record